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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH and NORTHWESTERN LUTHERAN ACADEMY,

Petitioners,

v.

THE STATE OF SOUTH DAKOTA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

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Edward Thomas Schilling, on behalf of St. Martin Evangelical Lutheran Church and Northwestern Lutheran Academy, petitions for a Writ of Certiorari to review the judgment of the Supreme Court of the State of South Dakota entered in this case on March 26, 1980 and the oral order denying Petition for Rehearing entered on May 2, 1980.

QUESTIONS PRESENTED

I. Whether application of the Federal Unemployment Tax Act as adopted by the State of South Dakota, to church elementary and secondary schools violates the Establishment and Free Exercise

Clauses of the First Amendment to the Constitution of the United States?

A. Does administration of the Federal Unemployment Tax Act involve impermissible inquiry by the State into religious law and polity?

B. Does administration of the Federal Unemployment Tax Act by the State involve comprehensive and continued surveillance of churches?

II. Whether there is a significant risk that a First Amendment right will be infringed so that there must be a clear expression of affirmative intent by Congress to include church elementary and secondary schools within the Federal Unemployment Tax Act, as adopted by the State of South Dakota?

III. Whether church elementary and secondary schools are exempt from coverage under the Federal Unemployment Tax Act, as adopted by the State of South Dakota.

PARTIES TO THE PROCEEDING AND STATEMENT UNDER RULE 28.4(b)

All parties to the proceedings from the Supreme Court of the State of South Dakota, from whose judgment review is sought, are included in the caption of the case before this Court. However, the constitutionality of an Act of Congress, the Federal Unemployment Tax Act, 26 U.S.C. §3301 et seq., as applied to church elementary and secondary schools is drawn into question in this matter and neither the United States nor any department, office, agency, officer or employee thereof is a party; therefore, 28 U.S.C. §2403(a) may be applicable.

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OPINIONS BELOW

The opinion of the South Dakota Supreme Court, reported at 290 N.W.2d 845 (S.D. 1980), appears in the appendix (Appendix A, pp. A1-A24). The opinion of the Circuit Court, Sixth Judicial Circuit of South Dakota, not reported, appears in the appendix (Appendix B, pp. A25-A34). The opinion of the hearing officer for the South Dakota Department of Labor Unemployment Insurance Division, not reported, also appears in the appendix (Appendix C, pp. A35-A45).

JURISDICTION

The judgment of the Supreme Court of South Dakota was entered on March 26, 1980. A timely petition for rehearing was denied by oral order on May 2, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3) (1970).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

The relevant provisions of 26 U.S.C. §3309(a) (1970), as it existed prior to the Unemployment Compensation Amendment Act of 1976, Pub.L.No. 94-566, §115, 90 Stat. 2670, which in effect, repealed Sec. 3309(a)(3) (1970), are as follows:

> (1) in the employ of (A) a church or convention or association of churches, or (B) an organiza-

tion which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches.

(2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order.

(3) in the employ of a school which is not an institution of higher education.

The relevant provisions of the South Dakota statutes, S.D. Compiled Laws Ann. §61-1-10.4, adopted to conform to federal law, as it existed prior to January 1, 1978 (before repeal of S.D. Compiled Laws Ann. §61-1-10.4(3) are as follows:

(1) In the employ of

(a) a church or convention or association of churches, or

(b) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches; or

(2) By a duly ordained, commissioned or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or

(3) In the employ of a school other than a state school which is not an institution of higher education; or

. . . .

STATEMENT OF THE CASE

A. The Federal Questions Were Raised in the Proceedings Below

All of the federal questions sought to be reviewed before the United States Supreme Court, including the violation of the establishment and free exercise clauses of the First Amendment to the Constitution of the United States, were first raised in oral argument and the briefs filed in the Administrative hearing before the South Dakota Department of Labor-Unemployment Insurance Division. The decision by the Appeals Referee found that the U.S. Department of Labor directed states to extend unemployment insurance coverage to employees of church elementary and secondary schools, (Appendix C, p. A40) and that in view of the directive from the U.S. Department of Labor the referee could not accept the constitutional argument. (Appendix C, p. A45).

The Notice of Appeal by Northwestern Lutheran Academy and St. Martin Evangelical Lutheran Church to the Circuit Court of South Dakota and the Assignment of Errors filed therein both included the constitutional issues. The Decision by the Circuit Judge (Appendix B, pp. A30-A33) found the churches exempt from the unemployment compensation law, and because of this finding that court felt it was unnecessary to address the constitutional question. (Appendix B, p. A33).

The Assignments of Error in the appeal to the Supreme Court of South Dakota by the State of South Dakota included the charge that the circuit court erred in failing to reach the constitutional issue. The decision by the Supreme Court of South Dakota (Appendix A, pp. A1-A24) covered all of the federal questions involved, including the constitutional question.

B. Brief Statement of Facts and the Proceedings Below

Northwestern Lutheran Academy is a four year preparatory school for entrance at Northwestern College or Dr. Martin Luther College in preparation for the preaching or teaching ministry (Appendix C, p. A39).

St. Martin Evangelical Lutheran Church is a Lutheran church that operates a parochial elementary school (Appendix C, p. A38).

Northwestern Lutheran Academy, which is not separately incorporated, but is owned and operated by the Wisconsin Evangelical Lutheran Synod, and St. Martin Evangelical Lutheran Church, which is separately incorporated as a church under South Dakota law, are both members of and part of the Wisconsin Evangelical Lutheran Synod (Appendix C, p. A36).

The Wisconsin Evangelical Lutheran Synod currently has 1105 member congregations in 47 states and three provinces of Canada (Appendix C, p. A36). Many of its member churches maintain elementary Christian day schools like the school maintained by St. Martin Evangelical Lutheran Church. In addition to area Lutheran high schools, which are maintained by associations of member churches, the Synod maintains four academies, of which Northwestern Lutheran Acadamy is one, two colleges and one theological seminary (Appendix C, p. A36).

Futher appropriate facts are in the Findings of Facts found in the Administrative Decision by the hearing officer for the South Dakota Department of Labor (Appendix C, pp. A36-A40).

Prior to January 1, 1978, the Federal Unemployment Tax Act (26 U.S.C. §3301 et seq., permitted states to

exempt certain services from taxation, which were codified in South Dakota in S.D. Compiled Laws Ann. §61-1-10.4. These exemptions provided that employment covered did not include services performed:

> (1) In the employ of (a) a church or convention or association of churches, or (b) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;
>
> (2) By a duly ordained, commissioned or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;
>
> (3) In the employ of a school which is not an institution of higher education . . . .

In 1976, the Federal Unemployment Tax Act was amended by Pub.L.No. 94-566, §15, 94 Stat. 2670, "The Unemployment Compensation Amendment Act of 1976," and as required by Congress, the South Dakota legislature, among other things, in effect repealed subsection (3) of S.D. Compiled Laws Ann. §61-1-10.4.

Thereafter, in December of 1976 and February of 1977, the U.S. Department of Labor issued two interpretive memoranda to state labor agencies explaining the repeal of 26 U.S.C. §3309(b)(3). These memoranda stated that the exemptions of 26 U.S.C. §3309(b)(1) and (2) would continue to apply to church schools. (Appendix E, pp. A62-A63 and Appendix F, pp. A64-A67).

Then, in April 1978, the U.S. Secretary of Labor announced in a letter to the Most Reverend Thomas C. Kelly, General Secretary of the U.S. Catholic Conference,

that the repeal by Congress of the primary and secondary school exclusions intended to result in unemployment compensation coverage of church related schools. Memoranda of this interpretation by the U.S. Secretary of Labor were given to the States and thereafter the South Dakota Department of Labor issued a determination that Northwestern Lutheran Academy and the school which is a part of St. Martin Evangelical Lutheran Church were subject to coverage under the unemployment insurance laws.

This determination was appealed by the church and the Wisconsin Evangelical Lutheran Synod to an Appeals Referee of the South Dakota Department of Labor. The Administrative Decision (Appendix C, p. A44) held that Northwestern Lutheran Academy and St. Martin Evangelical Lutheran Church were not exempt from the unemployment compensation law, that male teachers were ministers and therefore, exempt from coverage, but that female teachers were not ministers nor members of a religious order and therefore subject to coverage. The appeals referee further stated that because of the directive from the U.S. Department of Labor mandating coverage of church schools the Church's constitutional argument could not be accepted.

Northwestern Lutheran Academy and St. Martin's Evangelical Lutheran Church appealed to the Circuit Court of the Sixth Judicial District, Hughes County, South Dakota. That court concluded in its Memorandum Decision dated March 19, 1979, that the operation of these church schools was primarily for a religious purpose and that they were exempt under the Act from coverage. Therefore, the court did not find it necessary to address the constitutional issues raised nor whether female teaching ministers were exempt from coverage. (Appendix B, p. A33).

The State of South Dakota appealed from the judgment of the circuit court to the Supreme Court of South Dakota which reversed the circuit court (Appendix A, pp. A1-A24). The South Dakota Supreme Court held that Congress "apparently" intended to include elementary and secondary church schools within the unemployment compensation law when it repealed the elementary and secondary school exemption in 26 U.S.C. §3309(b)(3); that coverage of elementary and secondary church schools does not infringe on the freedom of religion guaranteed by the First Amendment to the Constitution; that coverage would not foster excessive entanglement even though "inclusion . . . will necessarily call for increased involvement between the state and the schools . . ."; and, that female teachers are not exempt from coverage as members of religious orders or as ministers because "they are allowed to perform only those functions normally associated with basic education."

REASONS FOR GRANTING THE PETITION

A. THE STATE OF SOUTH DAKOTA HAS DECIDED A FEDERAL QUESTION IN CONFLICT WITH THE DECISION OF ANOTHER STATE COURT OF LAST RESORT.

The Supreme Court of the State of North Dakota on June 20, 1980, held that a church operated school was exempt from unemployment compensation coverage as a church under 26 U.S.C. §3309(b)(1) and the North Dakota "mirror image" of the federal statute. The court further held that any attempt to include parochial schools under the Act would raise serious questions as to excessive governmental entanglement with religion. *Grace Lutheran Church v. North Dakota Employment Security*

Bureau and North Dakota Unemployment Compensation Division, — N.W.2d —, Civil Case No. 9419 (not yet reported but included in Appendix D, pp. A46-A61). The decision by the Supreme Court of North Dakota is in direct conflict with the decision of the Supreme Court of South Dakota for which the petition for a writ of certiorari is being sought.

The Court of Appeals of the State of Oregon in *Employment Division v. Archdiosese of Portland,* 42 Or. App. 421, 600 P.2d 926 (1979) held that Catholic parochial schools were exempt from the unemployment compensation tax. This decision is not by the highest court of the State of Oregon because the state failed to appeal the decision.

The South Dakota Supreme Court decision conflicts with every other court that has decided the merits of the issue of coverage of church operated schools under the unemployment compensation law. Comment, *Bringing Christian Schools Within The Scope of the Unemployment Compensation Laws: Statutory and Free Exercise Issues,* 25 Vill.L.Rev. 69 (1979-80). This conflict is more fully set forth in subsection C of this petition.

B. THE ISSUE OF COVERAGE OF CHURCH SCHOOLS UNDER THE FEDERAL UNEMPLOYMENT TAX ACT INVOLVES SUBSTANTIAL FEDERAL QUESTIONS.

1. The Federal Questions Involved Affect Every State Unemployment Fund and Every Religious Denomination.

The Federal Unemployment Tax Act (codified at 26 U.S.C. §3301-3311) is a comprehensive federal-state em-

ployment compensation system. Under this, and related tax laws, credits against the federal tax are given to employers and grants are given to states to administer their programs if the Secretary of Labor certifies that the state's law conforms to the federal law and that the state complies with these laws during an annual certification period. (See 26 U.S.C. §3302(a) and (b); 29 U.S.C. §49d; 42 U.S.C. §501; 26 U.S.C. §3304(c)).

The controversy between churches that operate schools and the states began when the U.S. Department of Labor reversed itself (See Appendix E, pp. A62-A63 and Appendix F, pp. A64-A67) and, directed the states to include employees of church schools within unemployment compensation law or lose their certification. (Unemployment Insurance Program Letter No. 39-78, May 30, 1978, State Exhibit 1).

Six states — Nevada, Alabama, Michigan, Tennessee, Texas and Washington — refused to extend unemployment compensation coverage to parochial schools and in 1979 the U.S. Secretary of Labor formally notified them of their non-compliance.

An administrative proceeding was had by two of these states, Alabama and Nevada, which is now on appeal in the United States Court of Appeals for the Fifth Circuit. *United States Department of Labor v. Alabama Department of Industrial Relations and Nevada Employment Security Department,* 44 Fed. Reg. 64, 378 (November 6, 1979), appeal filed, No. 79-4032 (5th Cir. 1979). Participating in this case are the Alabama Association of Christian Schools, Roman Catholic Dioceses of Nashville and Memphis, United States Catholic Conference, General Conference of Seventh-day Adventists, and Lutheran Church-Missouri Synod.

2. Coverage of Church Schools Under Unemployment Compensation Law Involves Excessive Entanglement Between Church and State.

a. The State Has Become Excessively Entangled In Its Inquiry Into Church Affairs.

If church schools are covered under unemployment compensation statutes church officials would be required to file reports with state agencies; keep work records which would be open at any time to state officials; answer subpoenas for information as the State of South Dakota has done here; respond to claims for benefits; and, participate in hearings on eligibility for benefits.

In *Surinach v. Pesquera de Busquets,* 604 F.2d 73 (1st Cir. 1979) the court held similar regulatory involvement unconstitutional under statutes investigating the rising costs of education, including that of church elementary and secondary schools. The court recognized that the government's

> ongoing powers necessary to ensure compliance with its orders and regulations, from compelling the keeping of records and the providing of testimony to the continuing inspection of papers and physical facilities . . . [have] the 'self-perpetuating and self-expanding propensities' which have alerted courts to an increased danger of an unconstitutional degree of entanglement. (*Id.* at p. 78).

In *McCormick v. Hirsch,* 460 F.Supp. 1337 (M.D. Pa. 1978) the court summarized the various factors in the school aid cases that led to a finding of excessive entanglement:

> The Court in applying this test has shown a particular concern and has sought to avoid active involvement of the sovereign in religious activities,

> the risks inherent in programs that bring about an administrative relationship between public bodies and church-sponsored schools, governmental evaluation and standards with respect to religious practices, any kind of day-to-day relationship between church and state, extensive investigation into church operations or finances, any sustained or detailed administrative relationship for enforcement of statutory or administrative standards, inherent difficulties in the combination of religious discipline and the possibility of disagreement between teacher and religious authorities over the meaning of statutory restrictions, and the entanglement of government in difficult classifications or what is or is not religious. (460 F. Supp. at 1352 (footnotes omitted)).

The above summary accurately reflects the constitutional problems inherent in bringing parochial schools within unemployment compensation law.

b. The State Has Become Excessively Entangled In Its Inquiry Into Religious Law And Polity.

The extent of inquiry into religious law and polity is clearly demonstrated by the South Dakota Supreme Court's holding that:

> Respondents argue that such [female] teachers cannot be denied exempt status, because the Synod dogmatically considers its female teachers to be part of its Christian ministry. The fact, however, is that female teachers in respondents' schools are not permitted to perform any sacerdotal duties or to vote on Synod matters; rather, they are allowed to perform only those functions normally associated with basic education. Appendix A, p. A16.

The South Dakota Supreme Court has taken upon itself the role of defining what constitutes the public ministry of the Wisconsin Evangelical Lutheran Synod.

Another example of the state's intrusion into religious law and polity involves the termination of a teacher. Under Unemployment Compensation Tax Law, an employee who is discharged for misconduct or terminates his employment without cause may be denied benefits. Thus, it becomes important to determine the reasons for termination. If a Synod teacher were discharged for teaching contrary to Synod doctrine and belief, or voluntarily terminated employment because of differences in doctrinal belief, the teacher could request a hearing to determine if unemployment compensation benefits were due. This hearing would involve doctrinal questions of belief and the hearing examiner would have to rule on these issues. The scope of the inquiry would involve the validity of the reason for the termination which of necessity would involve church doctrine.

Catholic Bishop of Chicago v. National Labor Relations Board, 559 F.2d 1112 (7th Cir. 1977), *aff'd on other grounds,* 440 U.S. 490 (1979) clearly demonstrates the constitutional problems that would be involved in that kind of inquiry by the State.

c. Administration of Unemployment Compensation Law Involves Excessive Surveillance of Churches by the State.

U.S. Department of Labor Unemployment Insurance Program Letter No. 39-78 dated May 30, 1978 (St. Exh. 1) provides that if an employee performs both non-exempt and exempt services during a single employment period, as in the case of services performed for a church-related school and a church, and the exempt service amounts to more than 50%, then all of the service of that employee would be exempt.

The potential for excessive entanglement in making these decisions is manifest. That religious teaching permeates the curriculum of private religious schools has been clearly acknowledged by the Supreme Court of the United States. *Lemon v. Kurtzman,* 403 U.S. 602 (1971).

In this case, as in *Lemon,* the inquiry necessarily involved in policing the application of the exemption "puts a public investigator into every classroom and entails a pervasive monitoring of these church agencies by the secular authorities." *Lemon,* 403 U.S. at 627. Yet without such monitoring, there would be no way of making the determinations required by the Secretary's interpretation of 26 U.S.C. §3309. As stated in *Catholic Bishop* "[i]t is not only the conclusions that may be reached . . . which may impinge on rights guaranteed by Religion Clauses, but the very process of inquiry leading to findings and conclusions." 440 U.S. 490 (1979).

The church schools in this case argue that all of their courses of study are designed to advance their religious principles. Thus, in order to enforce the tax, it will be necessary for the state to determine as to each employee whether his or her activities are "purely religious" more than one-half of the time. That controversies will arise, for example, as to whether in a world history class the teacher spends more than one-half of any given session teaching purely "religious" or purely "secular" history can hardly be subject to doubt.

And, a janitor and church secretary would perform services for both the church and the school which is part of the church. A female teacher might, as part of her duties, teach Sunday School in the church basement, or the school basement, play the organ for church services and be responsible for the church choir. There might

be "church" functions in the school and "school" functions in the church. Thus, the state is required to make the determination whether, during any given pay period, an employee has spent less than one-half of his time on purely religious activities. If so, that employee is subject to unemployment compensation law.

3. The Decision by the Supreme Court of South Dakota Is Contrary To The Decision By This Court in National Labor Relations Board v. Catholic Bishop of Chicago, 440 U.S. 490 (1979), Because There Was No Clear Expression By Congress of An Affirmative Intent to Bring Church Schools Within the Unemployment Compensation Law.

This Court held in *National Labor Relations Board v. Catholic Bishop of Chicago,* 440 U.S. 490 (1979), that where there was a "significant risk" that the First Amendment might be infringed by some sort of entanglement between the church and State that there must be an "affirmative intention of the Congress clearly expressed" before the Court would construe coverage of parochial school teachers under the National Labor Relations Act.

That there is a significant risk of infringement of First Amendment rights, if not a clear demonstration of excessive entanglement, seems obvious when one considers the information required of churches by the state that heretofore has never been required, the inquiry into religious law and polity, and the surveillance necessary to police the law's provisions.

The South Dakota Supreme Court based its decision on the "apparent" intent of Congress and the political

expediency of that state's interest in conforming with the mandate by the U.S. Secretary of Labor.

The South Dakota Supreme Court ignored the fact that Congress did not express a clear and affirmative intent to bring parochial schools within coverage of the unemployment compensation law; further, the South Dakota Supreme Court ignored Congressional history of the amendment to the Federal Unemployment Tax Act, the contemporaneous interpretation by the U.S. Department of Labor, the consistent interpretation by the Internal Revenue Service of the broad meaning of "church," and the consistent rulings by the United States Supreme Court that church operated schools are primarily religious and are an integral part of the church.

4. The Decision by the South Dakota Supreme Court is Incongruous With Decisions by the U.S. Supreme Court Concerning Church Operated Schools.

The United States Supreme Court has consistently held that parochial, elementary and secondary schools may not receive state aids because they are an integral part of the church and serve a primarily religious purpose.

The decision by the South Dakota Supreme Court creates the incongruous result that church operated schools are not an integral part of the church nor primarily religious for the purpose of paying unemployment taxes, but constitutionally an integral part of the church so that they cannot receive parochial aid.

C. THE WIDESPREAD LITIGATION OF THE FEDERAL QUESTONS INVOLVED SHOULD BE SETTLED BY THE SUPREME COURT.

The national effect of coverage of church elementary and secondary schools is reflected in the widespread litigation of the issue.

In addition to the conformity proceedings involving Nevada, Alabama, Michigan, Tennessee, Texas and Washington referred to at Part B, 1 hereof, there is other litigation in federal and state courts involving coverage of church schools under unemployment compensation laws.

The United States District Court for the Central District of California granted a temporary injunction to two church groups enjoining the State of California from collecting unemployment taxes. *Grace Bretheren Church v. State of California,* Case No. CV 79-93 MRP (September 21, 1979) ; *Lutheran Church-Missouri Synod v. the State of California Employment Development Department,* Case No. CV 79-162 MRP (September 21, 1979). The court based its injunction upon separate findings that (1) the church operated schools come within the 26 U.S.C. §3309(b)(1)(A) "church" exemption; and that (2) the imposition and collection of the tax would be unconstitutional due to excessive entanglement between the Church and State.

Numerous cases have been initiated by parochial schools in the state courts and where the substantive issues were reached all have decided in favor of the schools at the trial level on the basis that the schools were exempt under the "church" exclusion or that there would be excessive entanglement. See *Grace Brethren Church v. California,* Nos. CV 79-93 MRP, CV 79-162

MRP, slip op. at 7-9 (C.D. Cal. Sept. 21, 1979); *Trinity Evangelical Lutheran Church v. Department of Indus. Relations,* No. CV 78-500325 (Cir. Ct. Mobile County, Ala., Jan. 27, 1979); *Roman Catholic Church v. Louisiana,* No. 219, 660 (19th Jud. Dist. Ct., East Baton Rouge Parish, La., Aug. 31, 1979) (notice of appeal filed Oct. 17, 1979); *Employment Division v. Archdiocese of Portland,* 42 Or. App. 421, 600 P.2d 926 (1979); *Frankford Friends School v. Joseph,* No. 941 (Pa. Commw. Ct., filed Oct. 10, 1979); *Germantown Friends School v. Joseph,* No. 941 (Pa. Commw. Ct., filed Oct. 10, 1979); *Independent Baptist Church v. Tennessee,* Case No. 54227, (Ch. Ct. Hamilton County, Tenn., Mar. 23, 1979) (unpublished opinion); *Baptist Tabernacle v. Georgia Department of Labor,* Case. No. C-45866 (Fulton County Superior Court, Sept. 29, 1978) (unpublished opinion); *Lutheran Church-Missouri Synod v. Bowling,* Case No. 501-78 (7th Judicial Circuit, Sangamon County, Illinois, Nov. 15, 1979) (unpublished opinion).

In addition, various other state labor department appeal tribunals or state Attorney Generals have ruled church operated schools were exempt from coverage. Numerous other cases involving parochial schools are pending.

The significance of the federal questions involved and the extensive litigation occurring throughout the nation warrant resolution by the United States Supreme Court.

CONCLUSION

The petition for a writ of certiorari to the Supreme Court of the State of South Dakota should be granted.

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July, 1980

APPENDIX A

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * * *

IN THE MATTER OF THE DETERMINATION OF UNEMPLOYMENT INSURANCE COVERAGE OF NORTHWESTERN LUTHERAN ACADEMY AND ST. MARTIN'S EVANGELICAL LUTHERAN SCHOOL.

* * * *

APPEAL FROM THE CIRCUIT COURT OF THE
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

* * * *

HONORABLE ROBERT A. MILLER
Judge

* * * *

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* * * *

ARGUED October 10, 1979
OPINION FILED March 26, 1980

FOSHEIN, Justice

The State of South Dakota appeals from a judgment of the circuit court exempting respondents Northwestern Lutheran Academy and St. Martin's Evangelical Lutheran School from liability for payment of unemployment tax on their school personnel. We reverse.

Northwestern Lutheran Academy (NLA) is a four-year preparatory school for entrance to Northwestern College or Dr. Martin Luther College. At these latter institutions, students are trained for the ministry of the Wisconsin Evangelical Lutheran Synod. St. Martin's Evangelical Lutheran School (St. Martin's) is an elementary school operated by St. Martin's Evangelical Lutheran Church.[1] Both respondent schools have four or more employees exclusive of those found to be or-

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[1] NLA, owned and operated by the Wisconsin Synod, and St. Martin's Church, separately incorporated as a church under South Dakota law, are both members of the Wisconsin Synod and exempt from income tax liability under Section 501 of the Internal Revenue Code (26 U.S.C.A. §501) (1967)).

dained, commissioned or licensed ministers in the exercise of their ministry.

Prior to January 1, 1978, the Federal Unemployment Tax Act (FUTA) permitted states to exempt certain services from taxation.[2] These exemptions from unemployment tax liability were codified in South Dakota in SDCL 61-1-10.4, which provided that employment covered did not include services performed:

(1) In the employ of

(a) a church or convention of association of churches, or

(b) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches; or

(2) By a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or

(3) In the employ of a school other than a state school which is not an institution of higher education[.] . . .

---

[2] 26 U.S.C.A. §3301 et seq. FUTA is a comprehensive plan for unemployment compensation allowing for state and federal participation in its administration. Section 3301 of the Act imposes a federal unemployment tax, but Section 3302 of the Act permits tax credits against the federal tax for employers who have paid money into federally approved state unemployment tax funds. In order for a state to participate in the federal plan, it must meet certain requirements set out under Sections 3303 and 3304. While the respondents are exempted from the federal unemployment tax by Section 3306(c)(8), Sections 3304(a)(6) and 3309 require participating states to tax certain charitable organizations exempted from the federal tax.

In 1976 Congress amended FUTA[3] and, as requried by that amendment, the South Dakota Legislature in effect repealed subsection (3) of SDCL 61-1-10.4.

In April of 1978, the Secretary of Labor, charged with administration of FUTA, was called upon to determine whether church-related schools were exempt from state unemployment tax under Section 3309(b)(1) (corresponding to SDCL 61-1-10.4(1)). The Secretary's opinion, announced in a letter of April 18, 1978, addressed to the Most Reverend Thomas C. Kelly, General Secretary of the United States Catholic Conference, declared:

> The repeal by Congress of the exclusion, in Section 3309(b)(3) of the Federal Unemployment Tax Act, of employees of elementary and secondary schools was clearly intended to result in State coverage of church related schools, whose employees constitute over 80% of the employees of all non-profit schools. In light of the repeal of 3309(b)(3), we think the only services performed in the schools that may reasonably be considered within the scope of the exclusion permitted by 3309(b)(1) are those strictly church duties performed by church employees pursuant to their religious responsibilities within the school.

The Secretary's opinion resulted in a directive issued to all state employment agencies participating in the federal program, requiring such agencies to be able to assess unemployment compensation taxes against church-related schools in their states. The extension of this coverage under state law is a mandatory condition precedent to certification by the Secretary of Labor that the state

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[3] The Unemployment Compensation Amendments Act of 1976, Pub. L. No. 94-566, 90 Stat. 2667.

statute conforms to federal standards; the Secretary's certification, in turn, provides access to the system of tax credits and federal reimbursement of certain benefit costs.

The State of South Dakota, in order to continue its participation in FUTA, issued a determination that both NLA and St Martin's School are employers subject to coverage by the South Dakota Unemployment Insurance Law. This decision was reviewed by the Appeals Referee for the South Dakota Department of Labor whose decision found the schools subject to coverage, but that pastors and male teachers were exempt from coverage as ministers of a church in the exercise of their ministry, under SDCL 61-1-10.4(2). On appeal to the circuit court, the Appeals Referee was reversed and NLA and St Martin's were both found to be exempt from coverage under the South Dakota Unemployment Insurance Law.

I

[1] The threshold question on appeal involves a determination of congressional intent with respect to the repeal of Section 3309(b)(3) of FUTA (which resulted in the effective repeal of SDCL 61-1-10.4(3)). Respondents submit that the removal of the exclusion from unemployment compensation tax liability for school employment was meant only to extend coverage to private, nonparochial schools and did not affect the exclusion from coverage of parochial schools. An examination of the recent legislative background of FUTA, however, indicates otherwise. The Employment Security Amendments of 1970, by adding new language to various sections of FUTA[4], required state law coverage of individ-

[4] §§3304(a)(6), 3306(c)(8) and 3309(a)(1)(A)

uals employed by nonprofit organizations (including institutions of higher education). The committee reports accompanying the amendments demonstrate that Congress intended to extend coverage to individuals employed in nonprofit organizations including religious organizations The House Ways and Means Committee explained that:

> Under existing Federal law, services performed for nonprofit *religious, charitable, educational* and humane organizations for a State and its political subdivisions are exempt from the tax provisions of the Federal Unemployment Tax Act. While employment in these organizations and governments is not subject to fluctuations to the same degree as in commerce and industry, unemployment affects a substantial number of their employees, particularly people working in nonprofessional occupations. Your committee does not want to change the present tax status of nonprofit organizations, but it is concerned about the need of their employees for protection against wage loss resulting from unemployment.

H.R.Rep.No. 612, 91 Cong., 1st Sess. 11 (1969). (emphasis supplied). The Committee went on to delineate more clearly the limits of the Section 3309(b)(1) exemption (correlative to SDCL 61-1-10.4(1)) as applied to institutions of higher education:

> This paragraph excludes services of persons where the employer is a church or convention of association of church, but does not exclude certain services performed for an organization which may be religious in orientation unless it is operated primarily for religious purposes and is operated, supervised, controlled, or principally supported by a church or (convention or association of churches). Thus, services of the janitor of a church would be excluded but services of a janitor for a separately incorporated college, although it may be church related, would

> be covered. A college devoted primarily to preparing students for the ministry would be exempt, as would a novitiate or house of study training candidates to become members of religious orders. On the other hand, a church related (separately incorporated) charitable organization (such as, for example, an orphanage or a home for the aged) would not be considered under this paragraph to be operated primarily for religious purposes.

H.R.Rep.No. 612, 91 Cong., 1st Sess. 44 (1969). Identical language is found in S.Rep.No. 752, 91 Cong., 2nd Sess. (1970), at 48-59, U.S. Code Cong. & Admin. News 1970, p. 3606.

We conclude from our reading of the 1970 congressional revisions and the accompanying legislative reports that Congress expected the "operated primarily for religious purposes" language in section 3309(b)(1)(B) (corresponding to that in SDCL 61-1-10.4(1)(b)) to be narrowly construed, at least as applied to educational institutions. The Department of Labor has adhered to this congressional mandate and consistently interpreted the 1970 amendments as requiring state unemployment coverage of all institutions of higher education except for the narrow category including seminaries and novitiates which are devoted exclusively to religious training and indoctrination.

In view of Congress' apparent intention in 1970 to bring religiously affiliated institutions of higher education within coverage, and in light of the Labor Department's subsequent adoption of this interpretation, Congress' description of the objective behind the 1976 repeal of Section 3309(b)(3) (culminating in the repeal of SDCL 61-1-10.4(3)) is informative. According to Congress, the repeal of this section "has the effect of requiring

the State to pay unemployment compensation on the basis of services performed for *all* educational institutions. Under existing law, the State is only required to provide coverage of services performed for institutions of higher education." H.R.Rep.No. 755, 94th Cong., 1st Sess. 6 (1975). (emphasis supplied). As stated in the Senate Report on the bill:

> The bill would require the State to extend the coverage of their unemployment compensation programs to employees of nonprofit elementary and secondary schools (present law requires coverage for employees of institutions of higher education). The provisions for nonpayment of benefits during vacation periods to school employees of State and local governments would also apply to employees of nonprofit schools.

S.Rep.No. 1265, 94th Cong., 2d Sess. 2 (1976), U.S. Code Cong. & Admin. News, pp. 5997, 5998.

It is further significant that S.Rep.No. 1265, 94th Cong. 2d Sess., 8 (1976) estimated the number of new employees who would be covered as a result of the repeal of Section 3309(b)(3) at 242,000. This figure approximates the total number of teachers in all nonprofit elementary and secondary schools. Absent the inclusion of employees of church-related elementary and secondary schools, the figure would be considerably less than 242,000, because the teachers in such schools comprise more than half of the staff of all nonpublic and elementary and secondary schools in the United States.[5]

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[5] According to the Census Bureau's *Statistical Abstract of the United* States (1977), there were 261,000 full-time teachers in nonprofit elementary and secondary schools in 1975 of which 150,000 were in Roman Catholic Schools. Thus, it is clear that Congress contemplated that the repeal of §3309(b)(3) would bring all elementary and secondary schools within the ambit of FUTA.

[2] Moreover, when faced with the problem of statutory construction, we must show great deference to the interpretation given such statutes by the agency charged with their administration. *Udall v. Tallman,* 380 U.S. 1, 85 S.CT. 792, 13 L.Ed.2d 616 (1965). Shortly after the enactment of the 1970 amendments, the Department published its interpretation of those amendments which stated that the exemption for services performed for churches or religious organizations did not extend to services performed for religiously affiliated institutions of higher education. The Department's view of the objective behind the 1976 amendments, expressed in the Secretary's letter, supra, is a logical and necessary extension of the position which the Department has taken without objection since 1970. We find further significance in the fact that Congress did not attempt in 1976 to alter the Department's interpretation of §3309(b)(1). The "failure of Congress to alter or amend . . . [a] section, notwithstanding this consistent construction by the department charged with its enforcement, creates a presumption in favor of the administrative interpretation, to which we should give great weight even if we doubted the correctness of the ruling of the Department of Labor". *Costanzo v. Tillinghast,* 287 U.S. 341, 345, 53 S.Ct. 152, 154, 77 L.Ed. 350, 353 (1932).

II

[3-5] Having arrived at this determination of congressional intent, we must decide whether the South Dakota Unemployment Compensation Law infringes respondents' freedom of religion guaranteed by the First Amendment to the United States Constitution and Article VI, Section 3 of the South Dakota Constitution. In order to demonstrate that legislation conflicts with the Free

Exercise Clause, "it is necessary . . . for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *School District of Abington v. Schempp,* 374 U.S. 203, 223, 83 S.Ct. 1560, 1572, 10 L.Ed.2d 844, 858 (1963). Although the First Amendment protection of religious belief is absolute, religiously-based conduct "remains subject to regulation for the protection of society." *Cantwell v. Connecticut,* 310 U.S. 296, 303-304, 60 S.Ct. 900, 903, 84 L.Ed. 1213, 1218 (1940). Thus, legislation that inhibits conduct mandated by religious convictions, if justified by "interests of the highest order and those not otherwise served can overbalance legitimate claims for the free exercise of religion." *Wisconsin v. Yoder,* 406 U.S. 205, 215, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15, 25 (1972).

[6] Respondents do not outline any specific religious beliefs, or practices that conflict with inclusion of their school personnel in the unemployment compensation program. Assuming, however, that their claim relates to the alleged financial burden that FUTA places upon them they yet fail to meet their burden of demonstrating a violation of the Free Exercise Clause. The United States Supreme Court has refused to invalidate laws on free exercise grounds simply because they operate "so as to make the practice of . . . religious beliefs more expensive." *Braunfeld v. Brown,* 366 U.S. 599, 605, 81 S.Ct. 1144, 1147, 6 L.Ed. 563, 567 (1961). Neither does the unemployment insurance coverage in this case work in any manner to change the entire way of life of any persons associated with respondents. Cf., *Wisconsin v. Yoder, supra.* It is further significant that employers may meet their obligation by making reimbursement payments in lieu of contributions into the state unemployment compensation fund. See: §3304(a)(6)(b); §3309

(a)(2). An employer electing the reimbursement method is liable only for those amounts paid out to former employees in the form of benefits. Such benefits are not automatically paid to all individuals who become unemployed; rather, certain eligibility requirements must be met before benefits are received and liability is incurred by an employer. This method, by which it is conceivable that no liability may occur, can not be characterized as "coercive" since it will have little, if any, impact upon respondents' religious practices.

Further, coverage of parochial school employees under the unemployment compensation tax law is permissible because it is justified by a compelling governmental interest. This interest is to provide a system of income maintenance for unemployed individuals so that they have the resources for food, shelter, and other necessities of life until they are able to secure other employment (or until the expiration of the statutorily prescribed period for the receipt of benefits). The United States Supreme Court has repeatedly upheld social and regulatory programs which feature important governmental interests, even though such programs may have an incidental effect upon free exercise of religion. *Braunfeld v. Brown, supra; McGowan v. Maryland,* 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); *Prince v. Massachusetts,* 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944); *Reynolds v. United States,* 98 U.S. 145, 25 L.Ed. 244 (1878). Of further relevance are cases which have held that the failure to grant tax exemptions to religious organizations did not violate the free exercise clause. See, e.g., *Watchtower Bible and Tract Society v. Los Angles County,* 181 F.2d 739 (9th Cir. 1950), *cert. denied,* 340 U.S. 820, 71 S.Ct. 51, 95 L.Ed. 602 (1950) (upholding state personal property tax levy upon religious litera-

ture). As noted in *Parker v. Commissioner,* 365 F.2d 792, 795 (8th Cir. 1966), *cert. denied,* 385 U.S. 1026, 87 S.Ct. 752, 17 L.Ed.2d 674 (1967):

> The receiving of an exemption is thus a matter of legislative grace and not a constitutional right. As long as exemptions are denied by the Commissioner upon a non-discriminatory basis using specific and reasonable guidelines and without inquiry into the merits of the particular religious doctrines, the withholding of religious exemptions is permissible under the Constitution.

Because the Secretary's interpretation of the amended statute, *supra,* avoids inquiry into the merits of any particular religious doctrine and will result in nondiscriminatory enforcement of FUTA as applied to all nonprofit elementary and secondary schools, the interpretation does not violate the Free Exercise Clause.

In *Mitchell v. Pilgrim Holiness Church Corp.,* 210 F.2d 879 (7th Cir. 1954), *cert. denied,* 347 U.S. 1013, 74 S.Ct. 867, 98 L.Ed. 1136 (1954), the court held that refusal to comply with the federal minimum wage law cannot be justified on religious grounds. The court there stated that the Fair Labor Standards Act "does not . . . *prohibit* the free exercise of religion by the defendant nor does it *lay a flat tax* on the privilege" (emphasis in orignial). 210 F.2d at 883. The court went on to state that the remedial character of the Fair Labor Standards Act — "to insure to the workers of the United States engaged in the production of goods for commerce a minimum wage sufficient to maintain a minimum standard of living" — justified any incidental impact upon their employer's free exercise of religion. *Id.,* at 884. Similarly, in the present case, unemployment insurance coverage will have no more than a minimal impact on any religious practice. Further, the purposes of the un-

employment compensation program — to insure that eligible persons will be able to maintain a minimum standard of living and that the detrimental effects of such unemployment will not have an adverse effect on the economy — are sufficiently compelling to override any incidental burden upon respondents' activities.

III

Respondents contend that removal of the exemption would foster excessive entanglement between church and state in violation of the First Amendment. It is true that the inclusion of certain employees under the state's unemployment insurance law will necessarily call for increased involvement between the state and the schools. Such involvement, however, does not constitute excessive entanglement violative of the First Amendment. As the United States Supreme Court has noted, it has never been thought either possible or desirable to enforce a regime of total separation between church and state; thus, the high wall of separation in modern interpretation has become "a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship". *Lemon v. Kurtzman,* 403 U.S. 602, 614, 91 S.Ct. 2105, 2112, 29 L.Ed.2d 745, 756 (1971).

[7-8] It is clear from decisions of the Supreme Court that programs which require constant state surveillance or supervision to police the provisions of state programs or that single out church-related schools for preferential treatment will not be tolerated. *Wolman v. Walter,* 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977); *Tilton v. Richardson,* 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971); *Walz v. Tax Commission,* 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970); *Everson v. Board of Education,* 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711

(1947). Any entanglement between church and state in the present case does not reach the level of that which was struck down in *Lemon v. Kurtzman, supra.* In that case, state statutes provided state reimbursement to non-public elementary and secondary schools for the cost of teacher's salaries, textbooks and instructional materials. Under one statute, participating schools were requried to identify the cost of secular educational service by prescribed accounting procedures that were subject to state audit. The other statute provided annual salary supplements to teachers of secular subjects in non-public elementary school. The teachers were required to sign a written statement agreeing not to teach religious courses while receiving salary supplements, and were required to teach only subjects taught in public schools, using the same materials. Such statutes were found to create excessive entanglement because comprehensive and continuing state surveillance would be required to insure that the programs' provisions were obeyed. In the present case, respondents contend that because different benefits accrue to those employees that are laid off and those that are fired, the state will necessarily become involved in questions of doctrinal interpretation. Such is not the case. The teachers in respondents' schools are not under contract; rather, they receive a "call" from the church and there are only two ways that a teacher may be released from that call. One is by teaching false doctrine and the other is by misconduct as outlined by respondents' own standards. In both cases, the rules relating to dismissal are regulated by internal doctrinal matters controlled by the church. The state, therefore, need only determine whether the employee was fired or laid off. The employee, as before, will be left to the mercy of respondents' personnel practices.

Respondents also rely on *National Labor Relations Board v. Catholic Bishop of Chicago,* 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979). The issue in that case was whether an NLRB attempt to exercise jurisdiction over diocesan schools to determine whether a particular personnel practice constituted an unfair labor practice fostered excessive entanglement between church and state. The Seventh Circuit United States Court of Appeals held in the affirmative. The Supreme Court stated that the resolution of such a question "in many instances, [would] necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission" and thus create excessive entanglement. 99 S.Ct. at 1320. While noting the risks of entanglement inherent in such a relationship, however, the Court declined to decide the First Amendment question in the absence of a clear expression of an affirmative intention of Congress to bring teachers and employees in church-related schools within NLRB jurisdiction. The majority's extended discussion of the entanglement question nonetheless suggests that had such congressional intent been found to exist, serious issues of constitutional magnitude would arise. The minimal entanglement that might result in the present case, however, does not approach the potential effect, noted in *Catholic Bishop,* of mandatory collective bargaining on the ability of clerical authorities to administer their schools. In no case would the state be required to actually adjudicate employer/employee disputes in a sectarian school setting. Unemployment insurance coverage does not necessitate state involvement in the development of curriculum, faculty standards, working conditions or any other aspect of school operations. The unemployment insurance system would generally come

into play only after an employee had been terminated and was no longer connected in any way with the particular school. Further, the financial impact of the unemployment insurance compensation law cannot be compared with the financial ramifications of NLRB jurisdiction over diocesan schools. In the case of the NLRB, there exists power to order reinstatement with back pay and to utilize judicial authority to enforce its ruling. The state has no such power in the present case. We also note that the simple determination of the amount of time spent by employees working in respondents' schools, as opposed to its churches, does not foster entanglement of constitutional dimensions.

IV

[9] Finally, respondents contend that female teachers are exempt from coverage as members of a religious order under SDCL 61-1-10.4(2). Respondents argue that such teachers cannot be denied exempt status, because the Synod dogmatically considers its female teachers to be part of its Christian ministry. The fact, however, is that female teachers in respondents' schools are not permitted to perform any sacerdotal duties or to vote on Synod matters; rather, they are allowed to perform only those functions normally associated with basic education. Thus, their coverage under the unemployment compensation law is appropriate.

The judgment of the circuit court is reversed and the case is remanded with directions to reinstate the decision of the Appeals Referee.

WOLLMAN, C. J., and DUNN and MORGAN, JJ., concur.

HENDERSON, J., dissents.

HENDERSON, Justice (dissenting).

I respectfully dissent.

The object and purpose of the Wisconsin Evangelical Lutheran Synod, as set forth in its constitution, is to "extend and conserve the true doctrine and practice of the Evangelical Lutheran Church." One method of achieving this is by "establishing and maintaining theological seminaries, colleges, academies, schools, and other institutions." The Synod believes a theological basis exists for its schools. It holds the conviction that training of the youth involves both education and religion and the two are so closely interwoven that they cannot be separted. They operate school programs in accordance with their beliefs.

The Synod has 1105 churches of which 330 operate elementary Christian day schools. St. Martin's Evangelical Lutheran School, appellee, is one of these 330 elementary schools. The Synod also maintains two types of secondary schools: (1) Area high schools, designed to provide a Christian education to students at this level, and (2) Academies, structured to provide secondary education for individuals planning to enter the preaching or teaching ministry of the Church. Northwestern Lutheran Academy, appellee, is one of four such academies maintained by the Synod. The Synod has both teaching and preaching ministers. These ministers and teachers receive similar religious training; both receive, they sincerely believe, a divine, life-long call to serve their church and God. The Synod considers the female teachers to be part of the ministry and they have responsibilities equal to that of the male teachers. Courses offered

at the school and at the academy are taught from a religious viewpoint based upon scriptural convictions held by members of the Wisconsin Evangelical Lutheran Synod. The school is financed 100% by the local congregation. The Synod owns, operates, and finances the academy.

Both the school and the academy are exempt from income taxation under Section 501(c)(3) of the Internal Revenue Code. In the past, they have also been exempted from Federal Unemployment Tax Act (FUTA) coverage by SDCL 61-1-10.4(3), which corresponds to 26 U.S.C. Section 3309(b)(3). SDCL 61-1-10.4, until recently, provided in pertinent part:

> 61-1-10.4 EXEMPT EMPLOYMENT BY CHURCHES, INSTITUTIONS AND STATES. — [f]or the purposes of Sections 61-1-10.2 and 61-1-10.3 the term "employment" does not apply to service performed:
>
> (1) In the employ of
>
> (a) a church or convention of association of churches, or
>
> (b) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or *primarily supported by a church or convention or association of churches* (emphasis supplied); or
>
> (2) By a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or
>
> (3) In the employ of a school other than a state school which is not an institution of higher education prior to January 1, 1978.

The Unemployment Compensation Amendments Act of 1975, P.L. 94-566, 90 Stat. 2667, removed the sub-

section (3) exemption. Memoranda were thereupon sent to state employment security agencies by the U.S. Department of Labor, directing that all "church-related nonprofit elementary and secondary schools" be required to participate in the program. I am not bound by the interpretation of a bureaucrat in a government agency in Washington, D.C.

At a hearing conducted by the Field Service of the South Dakota Department of Labor, Unemployment Insurance Division, it was held that both schools were employers subject to S.D. unemployment insurance laws. Neither am I bound by a state employee's interpretation of congressional action. That determination was appealed and a hearing was held on July 19, 1978, before a Labor Department appeals referee. In his decision, entered September 15, 1978, the referee affirmed the initial determination that the schools were employers subject to coverage. To put it another way, each echelon of bureaucracy within the Department of Labor upheld itself. The circuit court, on appeal, reversed the referee upon the basis that the decision was affected by error of law in a misapplication of law and clearly erroneous in light of the entire evidence in the record. I would affirm the circuit court.

Counsel for appellees contend that they are exempt under SDCL 61-1-10.4 because of their relationship to a church. The state maintains that the repeal of the subsection (3) exemption for non-public schools was aimed at church schools as well as secular schools. The appeals referee concluded that a "church," as used in the statute, was synonymous with a "house of worship" rather than an organization of worshippers. This interpretation is most untenable when noting the context

in which "church" is used. SDCL 61-1-10.4(1)(a) speaks of services performed in the employ of a church. If the term "church" in isolation is ambiguous, the context of this statute absolutely forecloses equation with a physical plant. Clear error was committed when the appeals referee defined the term in such a manner as to make the statute absurd and ineffectual under any circumstance. When subsection (3), relating to private school coverage was repealed, Congress had a perfect opportunity to modify or remove the church-related exclusions. That was not done. The fact that the definition of church embodies an organization, rather than an edifice, strongly indicates that SDCL 61-1-10.4(1) exemptions remain valid and useful. In 1954, the question of defining the term "church" arose before the U.S. Senate. The Senate Finance Committee in its report observed:

> Your committee understands that 'church' to some denominations includes religious orders as well as other organizations which as integral parts of the church are engaged in carrying out the functions of the church *whether as separate corporations or otherwise. It is believed the term church should be all inclusive.* (Senate Report No. 1622, 83rd Congress, 2nd Session, page 30) (emphasis added)

In 1955, the staff of the Joint Conference Committee published its explanation of the Internal Revenue Code of 1954, entitled, "Summary of the Provisions of the Internal Revenue Code of 1954. (H.R. 8300) as Agreed to by the conferees." On page 19 the staff explained:

> The term church is intended to include religious orders as well as other organizations which, as integral parts of the church, are engaged in carrying out the functions of the church, whether as separate corporations or otherwise.

With respect to FUTA, the legislative history gives no support whatever to a narrower definition of the term "church" other than being all inclusive and including integral parts of the church, such as the parochial school. Congress, when passing FUTA amendments, clearly understood its interpretation of the word "church."

The question thus becomes whether either or both of the schools fall within the subsection (1) exemptions. St. Martin's Evangelical Church School is not a separate entity of St. Martin's Evangelical Church. Appellants are attempting to cleave the school from the church and this cannot be done. The appeals referee found that while the school was state certified the school was supervised by a board of education elected from and by the local congregation. South Dakota requires accreditation of any school serving children under the age of sixteen in lieu of attending public schools. Inasmuch as religious schools must be state certified, this state requirement should not be the basis of labeling them strictly educational. Finance and supervision provide the critical nexus between church and school, which places the latter squarely within the SDCL 61-1-10.4(1)(b) exemption for services performed in the employ of an organization. The school is operated primarily for religious purposes and is operated, supervised, controlled or principally supported by the church. This is the heart of my dissent. The congregation of St. Martin's Church supports public schools, located within a reasonable proximity, through the payment of taxes; the only rational reason that it would bear the additional burden of operating and financing a private school would be for religious purposes. A clear error was committed by the appeals referee in concluding that the primary purpose of the school was not religious.

Northwestern Lutheran Academy's teaching faculty comes 50% from the teaching ministry and 50% from the preaching ministry. Of the students at the academy, 46% go on to become teachers or pastors. The academy's remaining 54% nevertheless receive courses of instruction with religious overtones. Again, it must be recognized that public secondary schools exist in reasonable proximity and are supported by taxes paid by members of the Synod. It is obvious that these members send their children to a school which embraces their religious beliefs and where their children will be taught Christian values. The academy exists only for church purposes. The fact that the state imposes state certification does not change the character of the academy which is to propagate the faith of the Synod, and it is manifestly wrong for a state agency to subordinate that mission.

Any attempt to subject appellees, who are religious organizations operating religious schools, to an unemployment compensation law would be an impermissible entanglement between the church and state contrary to the First Amendment to the Constitution of the United States and Article VI, Section 3 of the South Dakota Constitution which provides for freedom of religion. The First Amendment provides in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

Under the unemployment compensation law, an employee who is laid off from work is entitled to unemployment compensation benefits, but an employee discharged for misconduct may be denied benefits. The majority opinion alludes to the fact that the only two ways a teacher may be released for cause is by teaching false doctrine and by misconduct as outlined by appellee's

own standards. It concludes that since rules relating to dismissal are regulated by internal doctrinal standards controlled by the church, there would only be minimal entanglement because the state has only to determine whether the employee was fired or laid off. This matter of potential entanglement cannot be so cursorily treated. Let us hypothesize that the Synod discharged an employee citing the reason as teaching contrary to school doctrine or misconduct, but the employee contends that the real reason for the discharge was due to budgetary concerns, and therefore, he or she was merely laid off. This employee could request a hearing to determine if he or she was entitled to full benefits. Granted, while the entanglement would not reach the proportions as that found in *N.L.R.B. v. Catholic Bishop of Chicago,* 440 U.S. 490, 99 S.Ct. 1313, 59 L.Ed.2d 533 (1979), such a hearing would nonetheless involve the question of whether the teacher did or did not teach contrary to Synod doctrine or on what basis, according to doctrinal standards, the employee's action constituted misconduct. The hearing examiner would have to rule on these matters of religious belief and misconduct, which is the kind of entanglement prohibited by the First Amendment to the Constitution.

The power to tax, surveil, and supervise this program is the power to destroy parochial schools. This program is another insidious spoke in the web of entanglement which chokes the free spirit of religious schools and their ability to function in their dedication to God. If religious schools are mandated into state and federal programs which exact money from them at governmental statutory whim, they shall die. They cannot coexist with governmental interference and over-lay. Our forefathers fled to these shores that they might worship as they please

and to raise their children in their own religious faith. I do not believe in a system of government, congressional acts, state statutes, or legal interpretations by the judiciary that would destroy that dream. The Constitution is a bulwark against state invasion of religiously based schools. In it, I abide.

I do not believe that Congress intended the tax to be applicable to the services of church operations run directly by the church with its own employees. For a persuasive case in point, with the same basis issues and statutes and a result contrary to the majority opinion, see *The Lutheran Church, Missouri Synod, et al. v. State of California Employment Development Department, et al.,* (Case No. CV79-0162-MRP before the United States District Court, Division of California, Opinion rendered September 21, 1979).

APPENDIX B

IN CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF HUGHES)

In the Matter of the Determination
of Unemployment Insurance Coverage
of Northwestern Lutheran Academy
and St. Martin's Evangelical
Lutheran Church School

MEMORANDUM DECISION

This is an administrative appeal in which two church affiliated schools seek reversal of an employment insurance hearing officer's decision that certain employees of the schools are covered by the South Dakota Unemployment Insurance Law.

FACTS AND PROCEDURAL HISTORY

Northwestern Lutheran Academy is a four year preparatory school located in Mobridge, South Dakota. It is owned and operated by the Wisconsin Evangelical Lutheran Synod, but is not separately incorporated as a church. It has more than four employees who are not duly ordained, commissioned, or licensed ministers in the exercise of their ministry.

St. Martin's Evangelical Lutheran Church is located in Watertown, South Dakota, and is incorporated as a church under the laws of this state. The church operates an elementary school which employs four female teachers and three other employees, none of whom are

duly ordained, commissioned or licensed ministers in the exercise of their ministry.

Both schools are exempt from income taxation under Section 501(c)(3) of the Internal Revenue Code. They have in the past been exempted from Federal Unemployment Tax Act (FUTA) coverage by SDCL 61-1-10.4 (3), which corresponds to 26 USC Section 3309(b)(3). SDCL 61-1-10.4 until recently provided in pertinent part:

> 61-1-10.4 EXEMPT EMPLOYMENT BY CHURCHES, INSTITUTIONS AND STATES. —for the purposes of Section 61-1-10.2 and 61-1-10.3 the term "employment" does not apply to service performed:
>
> (1) In the employ of
>
> (a) a church or convention or association of churches, or
>
> (b) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches; or
>
> (2) By a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or
>
> (3) In the employ of a school other than a state school which is not an institution of higher education prior to January 1, 1978.

The Unemployment Compensation Amendments Act of 1975, P.L. 94-566, removed the subsection (3) exemption. Memoranda were thereupon sent to state employment security agencies by the U.S. Department of Labor, directing that all "church-related nonprofit ele-

mentary and secondary schools" be required to participate in the program.

At a hearing conducted by the Field Service of the South Dakota Department of Labor, Unemployment Insurance Division, it was held that both schools were employers subject to S.D. unemployment insurance laws. That determination was appealed and a hearing was held on July 19, 1978, before a Labor Department appeals referee. In his decision entered September 15, 1978, the referee affirmed the initial determination that the schools were employers subject to coverage.

QUESTIONS PRESENTED

I.

ARE THE SCHOOLS EXEMPT FROM UNEMPLOYMENT TAX LIABILITY BY LAW, BECAUSE OF THEIR ASSOCIATION WITH CHURCHES?

II.

IF THE SCHOOLS ARE NOT EXEMPT, DOES THE FAILURE TO EXEMPT THEM VIOLATE CONSTITUTIONAL PROHIBITIONS AGAINST ENTANGLEMENT OF CHURCH AND STATE?

DECISION

This is another controversy between the federal government and other entities in which the state finds itself caught in the middle. If it does not adopt the interpretation urged by the U.S. Department of Labor, the state ostensibly faces loss of federal money or credit under FUTA. If that interpretation is adopted, schools

found to be ineligible for public assistance in various "paroch-aid" cases must now pay taxes for employment security for some employees. Either the state or the schools must lose, while the federal agency which caused the conflict is unaffected.

The law that must be applied in the first instance is SDCL 61-1-10.4, as previously set forth, and SDCL 61-1-10.3. The latter statute provided in pertinent part:

> 61-1-10.3 COVERED EMPLOYMENT BY RELIGIOUS, CHARITABLE, EDUCATIONAL OR OTHER ORGANIZATION. — "Employment" includes services performed after December 31, 1971, by an individual in the employ of a religious, charitable, educational or other organization, but only if the following conditions are not excluded from "employment" under subdivisions (1), (2), (3), (4) or (5) of §61-1-10.4:
>
> (1) The service is excluded from "employment" as defined in the Federal Unemployment Tax Act solely by reason of section 3306(c)(8) service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from the income tax under 501(a) of the federal act; and
>
> (2) The organization had four or more individuals in employment for some portion of a day in each of twenty different weeks, whether or not such weeks were consecutive, within either the current or preceding calendar year, regardless of whether they were employed at the same moment of time.

These state statutes reflect provisions of the federal statutes governing coverage, so those laws will not be restated herein. The constitutional provisions to be con-

sidered include the first and fourteenth amendments to the U.S. Constitution and Article VI, section 3 of the South Dakota Constitution. Those clauses provide, respectively:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.
>
> * * *
>
> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within jurisdiction of the equal protection of the laws . . .
>
> * * *
>
> The right to worship God according to the dictate of conscience shall never be infringed. No person shall be denied any civil or political right, privilege or position on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed as to excuse licentiousness, the invasion of the rights of other, or justify practices inconsistent with the peace or safety of the state.
>
> No person shall be compelled to attend or support any ministry or place of worship against his consent nor shall any preference be given by law to any religious establishment or mode of worship. No money or property of the state shall be given or appropriated for the benefit of any sectarian religious society or institution.

I.

ARE THE SCHOOLS EXEMPT FROM UNEMPLOYMENT TAX LIABILITY BY LAW, BECAUSE OF THEIR ASSOCIATION WITH CHURCHES?

Counsel for the schools contends that they are exempt under statute because of their relationship to a church. The position of the State Department of Labor is that the repeal of the subsection (3) exemption for non-public schools was aimed at church schools as well as secular schools. The decision of the appeals referee adopted the state's rationale, and that decision is now alleged to be clearly erroneous, arbitrary and capricious, and affected by error of law. It is therefore necessary to consider the referee's decision in the context of applicable statute.

The appeals referee concluded that "church" as used in the statute was synonymous with a "house of worship" rather than an organization of worshippers. One need only note the context in which "church" appears to see how untenable this position is. SDCL 61-1-10.4(1)(a) speaks of services performed in the employ of a church. If the term "church" in isolation is ambiguous, the context of this statute absolutely forecloses equation with a physical plant. Clear error was committed when the appeals referee defined the term in such a manner as to make the statute absurd and ineffectual in any circumstance.

The state's brief clearly establishes a trend of widening employee coverage by unemployment taxation laws. The state urges construction of the statute in light of the purposes it seeks to achieve and the evils it seeks to remedy. Legislative history is presented at length, including statistical information that reveals that impact

on church-related schools was considered. Finally it is argued that this Court should defer to the administering agency's construction of the law in question.

This Court must decline the state's invitation to look behind the apparent meaning of the "employ of a church" exception. The state's position appears to be premised upon the act of repealing the private school exemption rather than upon the remaining statute. This Court will not indulge in statutory construction where no ambiguity appears in the statute. *Osaka Shosen Kaisha Line v. United States,* 300 U.S. 98, 81 L.Ed. 532 (1936). It is not permissible to create obscurity in statute for the purpose of invoking constructoin. *Minneapolis, St. Paul and S. Ste. M. R. C. v. Industrial Commission,* 153 Wis. 552, 141 N.W. 1119 (1913). When subsection (3), relating to private school coverage, was repealed, Congress had a perfect opportunity to modify or remove the church-related exclusions That was not done, and in fact coupled with the definition of church as an organization rather than an edifice strongly indicates that SDCL 61-1-10.4(1) exemptions remain valid and useful.

The question thus becomes whether either or both of the schools fall within the subsection (1) exemptions. The schools are sufficiently different in services, goals and organization to merit individual attention.

St. Martin's Evangelical Church School, as has been previously noted, is not separately incorporated from St. Martin's Evangelical Church. The appeals referee found that, while the school was state certified, the school was supervised by a board of education elected from and by the local congregation. It was further determined that the school was 100% financed by the local congre-

gation, and that all courses offered at the school were taught from a religious viewpoint. Finance and supervision provide the critical nexus between church and school that places the latter squarely within the SDCL 61-1-10.4(1)(b) exemption for services performed in the employ of an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church. The congregation of St. Martin's Church supports public schools through its taxes, and the only rational reason that it would bear the additional burden of operating and financing a private school would be for religious purposes. In the absence of evidence of other purposes which a public school could not meet, a clear error was committed in concluding that the primary purpose of the school was not religious.

Although the purpose and organization of Northwestern Lutheran Academy differs somewhat from that of the St. Martin's School, it may still fit within the (1)(b) exemption. Again, the criteria are:

(a) operation, supervision, control or principal support by a church or convention or association of churches, and

(b) operation primarily for church purposes.

The appeals referee found that the academy was controlled and principally supported by the Wisconsin Evangelical Lutheran Synod. Webster's New Collegiate Dictionary defines synod as "a regional or national organization of Lutheran congregations." If this is not synonymous with "church", it is with "association of churches", and therefore the first criterion is satisfied.

The second inquiry is whether the academy is operated primarily for church purposes. Insofar as the academy recruits and trains ministers for the church, it operates exclusively for church purposes. The remaining 54% of the students receive, as in the case of the St. Martin's student, courses taught from a religious viewpoint. Because public secondary schools exist in reasonable proximity, are supported by taxes paid by individual members of the synod, and offer quality education, it must again be assumed that the reasons students attend the academy is something other than garden variety education. The academy operates for church purposes, and no amount of state certification or requirements can remove this salient element of the academy. When the only reason for separate existence found in the record is the propagation of the faith of the synod, the referee clearly errs in subordinating that purpose.

II.

IF THE SCHOOLS ARE NOT EXEMPT, DOES FAILURE TO EXEMPT THEM VIOLATE CONSTITUTIONAL PROHIBITIONS AGAINST ENTANGLEMENT OF CHURCH AND STATE?

It is not necessary to address the constitutional question here because applicable statute exempts the schools from state imposition of unemployment taxes. Similarly, the question of whether the female teachers are members of a religious order need not be considered.

CONCLUSION

The decision of the appeals referee will be reversed as affected by error of law and clearly erroneous in

light of the entire evidence in the record. Counsel for the schools is directed to prepare and submit a judgment in accordance with this decision.

Dated this 19th day of March, 1979.

BY THE COURT:

/s/ Robert A. Miller
Robert A. Miller
Presiding Circuit Judge

ATTEST:

.....
Clerk of Courts

(SEAL)

APPENDIX C

STATE OF SOUTH DAKOTA

BEFORE THE SOUTH DAKOTA DEPARTMENT OF LABOR — UNEMPLOYMENT INSURANCE DIVISION

IN THE MATTER OF THE DETERMINATION OF UNEMPLOYMENT INSURANCE COVERAGE OF NORTHWESTERN LUTHERAN ACADEMY AND ST. MARTIN'S EVANGELICAL LUTHERAN CHURCH SCHOOL

ADMINISTRATIVE DECISION

This matter has come on for hearnig upon appeals having been duly filed by Northwestern Lutheran Academy, Mobridge, South Dakota, and the St. Martin's Evangelical Lutheran Church School, Watertown, South Dakota, appealing from a determination issued by the Field Service of the South Dakota Department of Labor, Unemployment Insurance Division, holding both organizations were employers subject to coverage by the South Dakota Unemployment Insurance Laws.

Hearing was scheduled and held in Aberdeen, South Dakota, on July 19, 1978, at 9:00 a.m. Present at the hearing as witnesses were Rev. Elton H. Huebner, Executive Secretary, Board of Trustees, Wisconsin Evangelical Lutheran Synod; Rolland Menk, Principal, St. Martin's Evangelical Lutheran Church School; and Rev. Daniel Malchow, President, Northwestern Lutheran Academy. The Northwestern Lutheran Academy and the St. Martin's Evangelical Lutheran Church were represented by E. Thomas Schilling, Attorney at Law. The

Department of Labor was represented by Peter J. Pagones.

FINDINGS OF FACTS

I.

Northwestern Lutheran Academy and St. Martin's Evangelical Lutheran Church are members of the Wisconsin Evangelical Lutheran Synod and are both exempt organizations under Section 501(c)(3) of the Internal Revenue Code.

II.

The object and purpose of the Synod, as set forth in its constitution, is to "extend and conserve the true doctrine and practice of the Evangelical Lutheran Church." One method of achieving this is by "establishing and maintaining theological seminaries, colleges, academies, schools, and other institutions."

III.

The Synod believes a theological basis exists for their schools. It holds the conviction that training of the youth involves both education and religion and that the two are so closely interwoven they cannot be separated. They operate school programs in accordance with these beliefs.

IV.

Of the 1105 local churches in the Synod, 330 operate elementary Christian day schools. The school operated by St. Martin's Evangelical Lutheran Church is one of these Christian day schools.

V.

The Synod maintains two types of secondary schools. Area high schools are designed to provide a Christian

education to students at this level. The second type of schools, academies, are designed primarily to provide education at the secondary level to those individuals planning to enter the preaching or teaching ministry of the Church. Northwestern Lutheran Academy is one of four such academies maintained by the Synod.

VI.

The Wisconsin Evangelical Lutheran Synod has both teaching ministers and preaching ministers, or pastors.

VII.

Pastoral training normally includes four years at a Synod academy, four years at the college operated by the Synod, Northwestern College, and four years at the Synod seminary, Wisconsin Lutheran Seminary. Students can enter the program at the college level from other institutions.

VIII.

Teacher training consists of four years of high school, usually at a Synod academy, and four years at Dr. Martin Luther College, the Synod's teacher training college. Teachers must be certified by the Synod to teach in a church or Synod school.

IX.

Pastors and teachers receive similar religious training.

X.

The Synod considers preaching ministers and male teaching ministers to have equal status in the Church. Each has an equal vote on Synod matters, including matters of doctrine. Both can and do perform the sacer-

dotal functions of the Church. Both pastors and teachers are formally ordained in a very similar manner. Both receive a divine, life-long call to the position in which they are to serve and the specific duties performed in such position are determined by the calling body. Both share equally in various programs of the Church, such as the hospitalization and pension programs, are considered self-employed by the Internal Revenue Service, and have an exemption from Social Security coverage. In cases where the Church provides a residence for the teacher, most jurisdictions have exempted the residence from tax on the same basis that the pastor's residence is exempt.

XI.

The Synod also has female teachers whom they consider part of the ministry. The female teachers have responsibilities equal to that of male teachers, receive identical training, and also receive a divine, life-long call. The scriptural convictions of the Church, however, prevent the female teachers from performing the sacerdotal functions and from voting in Synod matters.

XII.

The school operated by St. Martin's Evangelical Lutheran Church is state certified and offers education in kindergarten through eighth grade. Overall supervision over the school is exercised by a Board of Education elected from and by the local congregation. The school is 100% financed by the local congregation and is not a separate legal entity from the Church.

XIII.

Paid staff members at St. Martin's Evangelical Lutheran School include two male teachers, four female

teachers, and three other employees, one of whom also works at the Church.

XIV.

All education courses offered at the School are taught from a religious viewpoint based on the Scriptural convictions held by members of the Wisconsin Evangelical Lutheran Synod.

XV.

Northwestern Lutheran Academy is a state certified institution offering education in grades nine through twelve. The Synod is the principal source of support for the School and controls the operation and policy of the School.

XVI.

The purpose of the Academy, as listed in their school catalog, is as follows: "Northwestern Lutheran Academy is an institution owned and operated by the Wisconsin Evangelical Lutheran Synod. The purpose which it endeavors to serve is twofold. In keeping with the ever-increasing need for future workers in the preaching and teaching ministry, the Academy endeavors to recruit and provide training for such prospective workers. At the same time, in line with the reasons for its establishment, it desires to make a general Christian education on the secondary level available to parents who desire such an education for their children."

XVII.

The Academy admits students other than those specifically preparing for the teaching and preaching ministry because its location in a sparsely populated area results in space being available for this type of student. The curriculum at the Academy does not include some courses

which would be available at the Synod's area high schools, such as home economics or industrial arts. Approximately 50% of Academy students are preparing to become teachers or pastors. Approximately 46% of Academy graduates go on to this work.

XVIII.

The Academy has more than four employees exclusive of the pastors and male teachers on the staff.

XIX.

Courses offered at the Academy are taught from the same religious viewpoint as the courses in the local elementary Christian day schools.

XX.

The teaching faculty at the Academy comes 50% from the teaching ministry and 50% from the preaching ministry.

XXI.

By Unemployment Insurance Program Letter number 39-78, dated 5-30-78, the states were directed by the U.S. Department of Labor to extend unemployment insurance coverage to employees of church-related nonprofit elementary and secondary schools.

LAW APPLICABLE

61-1-10.3 COVERED EMPLOYMENT BY RELIGIOUS, CHARITABLE, EDUCATIONAL OR OTHER ORGANIZATION. — "Employment" includes services performed after December 31, 1971, by an individual in the employ of a religious, charitable,

educational or other organization, but only if the following conditions are met, and if such services are not excluded from "employment" under subdivisions (1), (2), (3), (4) or (5) of Section 61-1-10.4:

(1) The service is excluded from "employment" as defined in the Federal Unemployment Tax Act solely by reason of section 3306(c)(8) (service performed in the employ of a religious, charitable, educational or other organization described in section 501(c)(3) which is exempt from the income tax under 501(a) of the federal act); and

(2) The organization had four or more individuals in employment for some portion of a day in each of twenty different weeks, whether or not such weeks were consecutive, within either the current or preceding calendar year, regardless of whether they were employed at the same moment of time.

61-1-10.4 EXEMPT EMPLOYMENT BY CHURCHES, INSTITUTIONS AND STATE — For the purposes of Sections 61-1-10.2 and 61-1-10.3 the term "employment" does not apply to service performed:

(1) In the employ of

(a) a church or convention or association of churches, or

(b) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association or churches; or

(2) By a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or

(3) In the employ of a school other than a state school which is not an institution of higher education prior to January 1, 1978.

OPINION

The Referee concludes the St. Martin's Evangelical Lutheran Church School and Northwestern Lutheran Academy are employers subject to the South Dakota Unemployment Insurance Laws but that the pastors and male teachers performing services for these organizations are exempt from coverage.

The organizations in question are an elementary and a secondary school. They are exempt organizations under Section 501(c)(3) of the Internal Revenue Code. Prior to January 1, 1978, Section 61-1-10.4(3) of the South Dakota Law excluded service performed in the employ of a school which was not an institution of higher education. Pursuant to P.L. 94-566, the "Unemployment Compensation Amendments of 1976", this exclusion was removed by the South Dakota legislature effective January 1, 1978. The two schools are therefore subject to coverage if they meet the employment requirements of 61-1-10.3(2) and are not exempted by subsections (1)(a)), (1)(b) or subsection (2) of 61-1-10.4.

Section 61-1-10.4(1)(a) exempts employees of a church or convention of churches. The employer argues the term "church" was considered by Congress, in passing the Federal Unemployment Tax Act, and by the Internal

Revenue Service to be an all-inclusive term, including integral parts of the church such as parochial schools. The term "church", however, has been interpreted to the states to be used, within the context of unemployment insurance coverage, in a limited sense and be synonymous with an individual "house of worship" maintained by a particular congregation. The employees in question are not employed by a church within this meaning Rather they are employed by the school operated by the St. Martin's Evangelical Lutheran Church or by Northwestern Lutheran Academy, a school maintained by the Synod.

The testimony establishes the schools are operated, supervised, controlled, and principally supported by a church or convention of churches. The employer argues they are also operated primarily for religious purposes and therefore exempt under 61-1-10.4(1)(b). The Referee is of the opinion that the primary purpose of the schools is education and they are not exempt under this section. The St. Martin's Evangelical Lutheran Church School is certified by the state and fulfills the legal requirement of school attendance for the students. While the courses at the church school are clearly presented from a religious orientation and viewpoint, the fact remains that the students are in school to receive an education and education, not religious purposes, is therefore the primary purpose of the school. The catalog of the Northwestern Lutheran Academy expresses the purpose of the school as a two-fold one of training future workers in the Church and of providing a general Christian education at the secondary level. Of the students at the academy, 46% go on to become teachers or pastors. The school is accredited by the state to offer a secondary level education. The courses are also taught from the Synod's

religious viewpoint. While the Academy may endeavor to recruit and train future workers in the Church, its primary purpose is not religious, but to offer these and other students a general education at the secondary level.

The pastors performing services in the church schools are exempt from coverage under Section 61-1-10.4(2) as they are a "duly ordained, commissioned, or licensed minister of the church in the exercise of his ministry." The Referee concludes the male teachers in the schools are also exempt from coverage under this section. The male teachers and pastors receive similar religious training. Their specific duties are determined by the calling body. They have equal status in the Church in many respects, including receipt of a divine, life-long call, authorization to vote on Synod matters, and ability to perform the sacerdotal functions of the Church. Pastors are called to teaching positions and teachers can and do perform pastoral duties. The position of the male teacher in the Church is equivalent to that of a pastor to such a degree as to warrant exclusion under this section. The female teachers, however, would not be exempted under 61-1-10.4(2). The phrase "ordained, commissioned or licensed" is interpreted, for unemployment insurance purposes, to mean being vested with ministerial status in accordance with the procedure followed by the particular church denomination. The female teachers do not have this status as the Scriptural position of the Synod prevents them from voting on Synod matters, which pastors and male teachers can do, and from performing the sacerdotal functions of the Church. The employer argues the female teachers are excluded because they are members of a religious order. There is, however, no established "religious order" to which they belong. Rather they perform teaching services in a

church school after receiving the required training and being "called" by the school. As the female teachers are neither ministers nor members of a religious order, they are not exempt under 61-1-10.4(2)

Finally, the employer argues that the imposition of unemployment insurance coverage on the Synod schools would be an unconstitutional entanglement between the Church and state. In view of the directive to the states from the U.S. Department of Labor mandating coverage of church-related nonprofit, elementary and secondary schools, the Referee cannot accept this argument.

DECISION

It is the Referee's decision that the St. Martin's Evangelical Lutheran Church School and Northwestern Lutheran Academy are employers subject to coverage by the South Dakota Unemployment Insurance Law. It is further held that pastors and male teachers at these schools are exempt from coverage.

Dated this 15th day of September, 1978.

/s/ Don Kattke
Don Kattke
Appeals Referee

APPENDIX D

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Grace Lutheran Church,
a corporation
(Grace Lutheran School),

Petitioner and Appellee

v.

North Dakota Employment
Security Bureau and North Dakota
Unemployment Compensation Division,

Respondents and Appellants

Civil No. 9719

Appeal from the District Court of Burleigh County, the Honorable Gerald G. Glaser, Judge.

DISTRICT COURT JUDGMENT AFFIRMED; ADMINISTRATIVE DETERMINATION REVERSED.

Opinion of the Court by Pederson, Justice.

Nilles, Hansen, Selbo, Magill & Davies, P. O. Box 2626, Fargo, for petitioner and appellee; argued by J. Gerald Nilles.

Michael J. Wilma, Special Assistant Attorney General, P. O. Box 1537, Bismarck, for respondents and appellants.

Civil No. 9719

Grace Lutheran Church

v.

North Dakota Employment Security Bureau

PEDERSON, Justice.

This is an appeal by the Unemployment Compensation Division of the North Dakota Employment Security Bureau[1] from the decision of the district court that Grace Lutheran School, a division of Grace Lutheran Church, is not subject to the provisions of the North Dakota Unemployment Compensation Law. We affirm the judgment of the district court (§28-32-21, NDCC) and reverse the determination of the North Dakota Employment Security Bureau (§28-32-19, NDCC).

This case stems from changes made in the federal and state unemployment compensation laws. Briefly, an exemption for employees of elementary and secondary schools was repealed and a directive from the Secretary of Labor was issued that the new coverage included employees of *church*-related schools. Grace Lutheran School was notified that it was subject to the unemployment compensation tax. Because this case revolves around several sections of the unemployment Compensation Laws, a brief overview of unemployment compensation legislation follows.[2]

Unemployment compensation had its beginning in the depression of the 1930's with its concurrent high levels

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[1] See Ch. 522, S.L. 1979, Job Service North Dakota.

[2] For a more detailed discussion of the history of unemployment compensation legislation see Davis, "Bringing Christian Schools Within the Scope of the Unemployment Compensation Laws: Statutory and Free Exercise Issues," 25 Villanova L.Rev. 69, No. 1 (1979-80).

of unemployment. Congress enacted the Social Security Act of 1935 to encourage states to adopt unemployment compensation statutes to alleviate some of the hardships caused by the depression. Title IX of the Act levied an unemployment wage tax on "for profit" employers with eight or more employees,[3] but allowed covered employers a credit against this federal tax liability for up to 90% of the employer's contributions to certified state unemployment funds.[4] All states enacted unemployment compensation legislation by 1937. In order to meet the requirements for federal certification, state enactments were, what has been called, "mirror images" of the federal legislation. Four years after the passage of the Social Security Act, Title IX was reenacted as the Federal Unemployment Tax Act (FUTA).

From the mid-1950's to the present, a steady expansion of unemployment compensation coverage has occurred.[5] For purposes of this case, the more significant expansion started in 1970 when the states were required to extend coverage to employees of non-profit organizations.[6] How-

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[3] Social Security Act of 1935, Pub. L. No. 271, Tit. IX, §907(a) and (c), 49 Stat. 642-43 (1935).

[4] Only payments made into *certified* state funds entitle the payor to a reduction of this FUTA liability. 26 U.S.C. §3304(a) and (c).

[5] For example, in 1954 Congress extended coverage to employers with *four* or more employees and enacted an unemployment compensation program for federal employees. See Pub. L. No. 767, 68 Stat. 1130.

[6] 26 U.S.C. §3304(a)(6). See Employment Security Amendments Act, Pub. L. No. 91-373, 84 Stat. 695. Pursuant to 26 USCA §§3301 and 3306(c) (1976), non-profit organizations are exempt from paying *federal* unemployment insurance tax even though the federal government requires the states' programs to cover such organizations.

ever, §3309(b) of FUTA continued to permit the states to exclude from coverage, services performed:

"(1) in the employ of

(A) a church or convention or association of churches, or

(B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;

(2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;

(3) in the employ of a school which is not an institution of higher education."

In 1976, Congress amended §3309 by deleting subsection (b)(3), thus eliminating FUTA's general exclusion for elementary and secondary schools. In response to this amendment, the North Dakota Legislature made a number of changes to conform the state unemployment law to the federal law. Subsection (3) of §52-01-01(13)(h), NDCC, the "mirror image" of subsection (3) above, was deleted.[7] Section 52-01-01(13)(h)(1) and (2) remains unchanged and remains identical to the federal statute §3309(b)(1) and (2) quoted above.

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[7] Ch. 459, §4, S.L. 1977.

It was not until 1978 that the United States Secretary of Labor issued an opinion letter[8] officially stating for the first time that *church*-related elementary and secondary schools were covered by FUTA.[9] In response to this opinion letter, a directive was issued to all state employment agencies requiring the state agencies to assess unemployment compensation taxes against church schools.

On April 14, 1978, Grace Lutheran School, a church school owned and operated by Grace Lutheran Church, was notified that it was subject to coverage under the North Dakota Unemployment Compensation Law and that it had the option to pay the unemployment tax on a percentage basis or on a reimbursement basis. Grace Lutheran School objected on the ground that its teachers were employees of Grace Lutheran Church. Even though this is conceded by the Bureau and should have been included in findings by the Bureau, Grace Lutheran School was nevertheless required to and did elect the reimbursement method, but appealed from the determination that it was covered. A hearing was conducted before the Unemployment Compensation's Chief Appeals Referee which resulted in a determination that Grace Lutheran School was subject to the North Dakota unemployment compensation law. This decision was appealed to the North Dakota Employment Security Bu-

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[8] See *Independent Baptist Church, Etc. v. State of Tenn.*, 468 F. Supp. 71, 74 (E.D. Tenn. 1978), for a summary of the text of the Secretary of Labor's opinion letter.

[9] It is interesting to note that an administrative law judge, in a memorandum to the Secretary of Labor, noted that immediately after the 1976 amendments to FUTA were passed the Labor Department issued two non-public memoranda to the states indicating that church-school employees were still *excluded* from FUTA under §3309(b)(1). See footnote 121, 25 Villanova, L.Rev. 69 at 84.

reau which affirmed the decision of the Unemployment Compensation Division.

Thereafter, Grace Lutheran Church filed a petition for judicial review of the Bureau's decision in Burleigh County District Court. On October 11, 1979, a judgment was rendered which reversed the Bureau's decision and held that the employees of Grace Luthern School were not subject to the North Dakota Unemployment Compensation Law. The North Dakota Employment Security Bureau appealed this decision to the Supreme Court.

It is the Bureau's position that it was the intention of Congress (and the North Dakota Legislature) to cover employees of *all* elementary and secondary schools, including church-related schools, when §3309(b)(3) (and §52-01-01(13)(h)(3), NDCC) was deleted and that it is constitutionally permissible to extend unemployment compensation coverage to church-related schools.

It is Grace Lutheran Church's first contention that by deleting the subsection (3) exemption for elementary and secondary schools, public and private schools are now covered, but that employees of Grace Lutheran School are still exempt under §3309(b)(1)(A) (and §52-01-01(13)(h)(1)(a), NDCC), which provides an exemption for service performed in the employ of "a church or convention or association of churches." The trial court agreed with this contention. Secondly, Grace Lutheran Church contends that if Congress or the North Dakota Legislature intended that church schools be covered, the statute is an unconstitutional infringement on the church's First Amendment rights.

As a preliminary matter, we note that as this case involves an administrative agency, the Administrative

Agencies Practice Act (Chapter 28-32, NDCC) applies. Section 28-32-01, NDCC, defines an administrative agency to include any bureau having statewide jurisdiction and authority to make a determination which has the force and effect of law and which by statute is subject to review by the courts. The organization of the Employment Security Bureau is set out in Title 52, NDCC. Section 52-04-17 provides that the Unemployment Compensation Division may make administrative determinations with respect to whether or not an employer is covered under the unemployment compensation laws, hence it has statewide jurisdiction and authority to make determinations having the force of law. Section 52-06-27 provides for judicial review of decisions of the Employment Security Bureau.

The judicial review provisions of Chapter 28-32, NDCC, are not exclusive. Special statutes prevail if in conflict with the more general provisions of Chapter 28-32. *Evanson v. Wigen,* 221 N.W.2d 648 (N.D. 1974). However, in the instant case it appears that no such conflict exists. Both §52-06-27 and §28-32-15 provide that an appeal is to be taken within 30 days after notice of the decision of the agency. Section 28-32-19 deals with the court's scope of review on appeal. In cases where the facts are not in issue,[10] the court is to affirm the decision of the agency unless it finds:

> "1. The decision or determination is not in accordance with the law.
>
> "2. The decision is in violation of the constitutional rights of the appellant."

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[10] It could be contended that there is a conflict as to the correct standard for a court to apply in cases involving fact questions. See §52-06-27 and §28-32-19(5).

Review by the supreme court is governed by this same standard. See §28-32-21, NDCC.

Thus, the threshold questions on this appeal involve a determination of whether or not the agency's decision that church schools are covered by unemployment compensation legislation is in accordance with the law and, if so, whether or not that decision violates the constitutional rights of Grace Lutheran Church.

I. STATUTORY CONSTRUCTION

Generally, legislative intent must first be sought from the language of the statute. *Apple Creek Tp. v. City of Bismarck,* 271 N.W.2d 583 (N.D. 1978). "When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." Section 1-02-05, NDCC. Repeals by implication are not favored. *First American Bank & Trust Co. v. Ellwein,* 198 N.W.2d 84, 98 (1972).

In repealing the exemption for services performed "in the employ of a school which is not an institution of higher education," it is clear that public and private (non-church) elementary and secondary schools were covered by the unemployment compensation legislation. It is contended by the Bureau that *church*-operated elementary and secondary schools are covered. The issue is whether or not they are covered.

First of all, it is Grace Lutheran Church's contention that by leaving intact §3309(b)(*1*) when it repealed (b)(3), Congress intended that church-operated schools could still qualify for an exemption. Subsection (A) of §3309(b)(1) exempts all services performed in the employ of a church or an association of churches. It is

arguable that a school such as Grace Lutheran School that is not separately incorporated and whose teachers have employment contracts directly with the church would qualify for an exemption under this subsection.[11]

Secondly, Congress, in deleting §3309(b)(3) expressed no *specific* intent to require states to tax Christian schools. A recent Supreme Court decision states that in the absence of a clear expression of affirmative Congressional intent, an administrative agency may not assert jurisdiction over an organization if doing so may tend to jeopardize the religious freedoms of the organization. *NLRB v. Catholic Biship of Chicago,* 440 U.S. 490, 59 L.Ed.2d 533, 99 S.Ct. 1313 (1979). See also *Owen v. City of Independence,* — U.S. — (1980).[12]

Therefore, since Congress made no specific, express reference to church schools when deleting §3309(b)(3),

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[11] A church school whose teachers are not employed directly with the church school may still qualify for an exemption under Subsection (B) of §3309(b)(1). This section exempts services performed in the employ of an organization which is (1) operated primarily for religious purposes, and (2) operated, controlled, or principally supported by a church or convention or association of churches. As to the first requirement, the supreme court has characterized church schools as being operated primarily for religious purposes. *NLRB v. Catholic Bishop of Chicago, supra; Meek v. Pittenger,* 421 U.S. 349, 44 L.Ed.2d 217, 95 S.Ct. 1753 (1975); *Lemon v. Kurtzman,* 403 U.S. 602, 29 L.Ed.2d 745, 91 S.Ct. 2105 (1971). As to the second requirement, it would be necessary for the church school to show that it is administered by church officials, supported by church funds, that the teachers are members of the parent church, etc.

[12] In cases, where a tradition is rooted in the common law and is supported by strong policy reasons, "Congress would have specifically so provided had it meant to abolish the doctrine." *Owen v. City of Independence, supra.*

and since a persuasive argument can be made that church schools, such as Grace Lutheran, are excluded under §3309(b)(1), the required "clear expression of an affirmative intention of Congress" that church schools should pay unemployment compensation tax appears to be lacking.[13]

Applying the same rules of construction in considering the repeal of §52-01-01(13)(h)(3), NDCC, we reach the same conclusion. Without pointing out any ambiguity in the applicable statutes, the Bureau urges us to seek the intent of the Legislature from extrinsic aids. It points out that before the passage of Senate Bill 2213 [S.L. 1977, Ch. 459, §4, which repealed §52-01-01(13)(h)(3)] in a Senate committee hearing on Industry, Business and Labor, the committee members were advised that the bill would provide "protection for all state, and local governmental employees, *elementary and secondary school employees* and employees of municipalities and *parochial schools.*" [Emphasis added.] Minutes of January 24, 1977, Testimony Senate Industry, Business and Labor Committee of North Dakota Legislature.

Even though the North Dakota Legislature was informed that church schools would be covered by unemployment compensation with the repeal of §52-01-01(13)(h)(3), we conclude that the result was not accomplished. The clear and unambiguous language of §52-01-01(13)(h)(1)(a) provides an exemption for

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[13] Although several lower courts in other states have reached the same conclusion (see cases cited at footnote 116 of 25 Villanova L.Rev. 69 at 84), the South Dakota Supreme Court, in the case of *Matter of Northwestern Lutheran Academy,* 290 N.W.2d 845 (S.D. 1980), reached the contrary conclusion.

service performed in the employ of "a church or convention or association of churches." The removal of §52-01-01(13)(h)(3) did not ipso facto remove the other exemption. Furthermore, it is a long-established rule of law that if a statute is susceptible to two meanings, and one of those two meanings would make the statute invalid, the one which makes it valid prevails. See 2A Sands, Sutherland Statutory Construction (4th ed. 1972), §45.11, at 33; *State v. Julson,* 202 N.W.2d 145 (N.D. 1972); *Wallentinson v. Williams County,* 101 N.W.2d 571 (N.D. 1960); and *Marks v. City of Mandan,* 70 N.D. 434, 296 N.W. 34 (1940); all cited in *Kottsick v. Carlson,* 241 N.W.2d 842 (N.D. 1976).

II. CONSTITUTIONAL QUESTIONS

Only if we were to accept the contentions of the Bureau that church schools in North Dakota are covered by unemployment compensation as a result of the repeal of §52-01-01(13)(h)(3), could we look to see if requiring coverage violates the constitutional rights of Grace Lutheran Church. If it is possible to do so, this court avoids interpretations of statutes which place the statute in disharmony with the Constitution. *North American Coal Corp. v. Huber,* 268 N.W.2d 593 (N.D. 1978). Occasionally, however, because of public interest, we express views on issues when judicial economy indicates that issues which have been thoroughly briefed and argued should be disposed of. See, generally, *Saetz v. Heiser,* 240 N.W.2d 67, 70 (N.D. 1976). Accordingly, we will discuss the constitutional disharmony that would result from our sustaining the interpretation urged by the Bureau.

The First Amendament[14] of the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." Thus, is prohibits the government from making laws which either (1) foster the establishment of a religion or (2) prohibit the free exercise thereof. Both the establishment clause and the free exercise clause apply to the states under the Fourteenth Amendment. *Everson v. Board of Education,* 330 U.S. 1, 91 L.Ed. 711, 67 S.Ct. 504, 168 ALR 1392 (1946).

Although the scope of the establishment clause of the First Amendment is not precisely drawn, we know that it does more than forbid a state church, and that it does less than forbid every action by the government that affords a benefit to a religion. *Zorach v. Clauson,* 343 U.S. 306, 96 L.Ed. 954, 72 S.Ct. 679 (1952). In *Lemon v. Kurtzman,* 403 U.S. 602, 29 L.Ed.2d 745, 91 S.Ct. 2105 (1971), the court described the scope and main concerns of the establishment clause as follows:

> "Its author did not simply prohibit the establishment of a state church or a state religion . . . Instead they commanded that there should be 'no law *respecting* an establishment of religion.' A law may be one 'respecting' the forbidden objective while falling short of its total realization. . .
>
> "In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' *Walz v. Tax Commission,* 397 U.S. 664, 668, 25 L.Ed.2d 697, 701, 90 S.Ct. 1409 (1970)." 403 U.S. at 612.

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[14] See also Section 4, Constitution of North Dakota.

This last aspect — concern over active governmental involvement — was further defined in *Walz supra,* as follows:

> "Determining that the legislative purpose . . . is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result — the effect — is not an excessive government entanglement with religion." 397 U.S. at 674.

To analyze whether or not a statute violates the establishment clause three tests must be applied. *Lemon v. Kurtzman, supra.*

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen,* 392 U.S. 236, 243, 20 L.Ed.2d 1060, 1065, 88 S.Ct. 1923 (1968); finally, the statute must not foster 'an excessive governmental entanglement with religion.' *Walz, supra,* at 674, 25 L.Ed.2d at 704." 403 U.S. at 612-613.

If an affirmative response is possible for all three tests, the statute does not violate the clause.

The first two tests present no problem in the instant case. Extending unemployment compensation to elementary and secondary schools has a secular purpose, i.e., to avoid hardships for people temporarily without employment, and affords no basis for concluding that the legislative intent was to advance or inhibit religion. It is the last area — avoiding excessive governmental entanglement with religion — which is in issue here.

The Supreme Court has held that programs which require constant state surveillance or supervision to police them will not be tolerated. *Wolman v. Walter,* 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977);

Tilton v. Richardson, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971); *Lemon v. Kurtzman, supra; Walz v. Tax Commissioner, supra; Everson v. Board of Education, supra.* In *Lemon,* a case involving grants to parochial schools for salaries of teachers of secular subjects, statutes providing for the grants were held to violate the establishment clause as fostering excessive entanglement in view, inter alia, of (1) the religious purpose and operation of church-related elementary and secondary schools, (2) the necessity of state surveillance to insure that teachers, who are subject to control by the religious organization, observed the restrictions as to purely secular education, and (3) the necessity of the state's examination of the parochial school's financial records to determine which expenditures were religious and which were secular.

These same problems appear when applying unemployment compensation legislation to Grace Lutheran Church. First of all, the church school has a religious purpose, i.e., to educate its youth in accordance with the "confessional standards" of the congregation.

Secondly, it will require extensive state surveillance to enforce the program. For example, in the directive that was issued to all state employment agencies, the states were advised that if an employee performs both non-exempt and exempt services during a single employment period, and more than one-half of the services were exempt, "then none of the services of such employee for such period shall be deemed to be employment." In other words, if employment records for any period show that an employee was engaged in religious training services more than secular training services, that employee would not be covered under the unemployment

compensation law. Thus, in the case of a teacher who is employed by a church school (non-exempt) and who also performs religious duties for the church (exempt), the state agency will have to conduct extensive audits in order to determine whether or not the employee has spent more than one-half of his time on purely religious activity. This kind of state inspection and inquiry will also require extensive records, and "entails a pervasive monitoring of these church agencies by the secular authorities." *Lemon v. Kurtzman, supra,* 403 U.S. at 627 (Douglas, J., concurring).

An equally disturbing problem arises where an employee seeks benefits, as the agency will have to determine whether or not the decision of the church school to fire or lay off the employee was justified under the "good cause" standard. The teachers employed by Grace Lutheran Church are hired partially on the basis of religious and moral qualifications and are required by contract to teach in accordance with the "confessional standards" of the Lutheran Church. Thus, disputes may arise where the church dismisses an employee for failure to teach according to the religious tenets of the church. The employee may contend that the real reason he or she was dismissed was due to budgetary concerns. In such event, the state agency would have to determine whether or not the teacher did, in fact, fail to adhere to the religious tenets of the church. This is the type of entanglement prohibited by the First Amendment to the Constitution.

These factors support the conclusion that the end result of including church schools in unemployment compensation legislation raises serious questions as to excessive governmental entanglement with religion. Accordingly,

we avoid the interpretation which creates such disharmony.

The judgment of the district court is affirmed and the determination of the North Dakota Employment Security Bureau is reversed.

APPENDIX E

U.S. DEPARTMENT OF LABOR
EMPLOYMENT AND TRAINING
ADMINISTRATION
WASHINGTON, D.C. 20213

MEMORANDUM FOR:

ALL STATE AGENCY ADMINISTRATORS AND ALL REGIONAL ADMINISTRATORS, EMPLOYMENT AND TRAINING ADMINISTRATION

FROM:

LAWRENCE E. WEATHERFORD, JR.
Administrator, Unemployment Insurance Service

SUBJECT:

Supplement #1 — Questions and Answers Supplementing *Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976-P.L. 94-566*

Following enactment of H.kR. 10210 (P.L. 94-566) and the issuance of *Draft Lanuage and Commentary to Implement the Unemployment Compensation Amendments of 1976-P.L. 94-566,* legislative planning meetings were held in Washington, D.C., Atlanta, Georgia, Kansas City, Kansas and San Francisco, California. The enclosed questions and answers reflect inquiries made during these meetings.

The questions and answers are keyed to the applicable provision and its commentary in the *1976 Draft Legislation and are issued as a supplement to it.*

Please annotate your copies of the *1976 Draft Legislation* to reflect these additions.

Additional explanations and interpretations will be issued as needed and appropriate.

Enclosure

Supplement 1, 1976 Draft Legislation
December 7, 1976

* * *

Service excluded from required coverage of nonprofit organizations, section 2(k)(1)(D)
Refer: Commentary, page 25

1. *Question:*

   Do the 1976 amendments affect church related schools?

   Answer:

   Yes, to the extent that coverage is extended to elementary and secondary schools. In other respects no changes were made, and the exclusion in sections 3309 (b)(1), (2), (4), and (5) are still applicable. Accordingly the commentary on pages 27-30, *1970 Draft Legislation,* together with subsequent interpretations and explanations are still applicable.

   For example, the coverage of nonprofit elementary and secondary schools does not affect the optional exclusion in 3309(b)(1). The factors significant in determining whether or not service is performed

   > "(1) in the employe of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches"

remain unchanged.

Some of these matters were dealt with in various issues of Interpretation Series, P.L. 91-373 which are still pertinent.

* * *

APPENDIX F

U.S. DEPARTMENT OF LABOR
EMPLOYMENT AND TRAINING
ADMINISTRATION
WASHINGTON, D.C. 20213

MEMORANDUM FOR:

ALL STATE AGENCY ADMINISTRATORS AND ALL REGIONAL ADMINISTRATORS, EMPLOYMENT AND TRAINING ADMINISTRATION

FROM:

LAWRENCE E. WEATHERFORD, JR.
Administrator, Unemployment Insurance Service

SUBJECT:

Supplement #2 — Questions and Answers Supplementing *Draft Lanuage and Commentary to Implement the Unemployment Compensation Amendments of 1976—P.L. 94-566*

By this time a number of draft proposals to implement the provisions of P.L. 94-566 have been sent to the National office for review. The enclosed questions and answers reflect issues that have arisen in the course of that review.

The questions and answers are keyed to the applicable provision and its commentary in the *1976 Draft Legislation* and are issued as the second supplement to it.

Please annotate your copies of the *1976 Draft Legislation* to reflect these additions.
Additional explanations and interpretations will be issued as needed and appropriate.

Enclosure

Supplement 2, 1976 Draft Legislation
February 2, 1977

* * *

Definitions — service for nonprofit organizations, section 2(k)(1)(C)
Refer: Commentary, page 25

1. *Question:*

Must an "organization" be a "legal entity" for the purposes of section 3309(b)(1), FUTA?

Answer:

No. Section 3309(b)(1) provides that service performed —

> "(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches"

may be excluded from the required coverage of governmental entities and nonprofit organizations.

The word "organization" is broader than the phrase "legal entity" and will include but not be limited to such entities. Accordingly, an organization within the meaning of section 3309(b)(1) need not be a separate legal entity, but includes any organization other than the unit constituting a church or convention or association of churches, even though the organization may be so closely connected to the church, etc., as in fact to be operated, supervised or controlled by the church itself. See also the Answer to Question 2 below.

Definitions — service for nonprofit organization, section 2(k)(1)(C), cont.
Refer: Commentary, page 25

2. *Question:*

What factors govern the application of the exclusions in section 3309(b)(1)(A) and (B), FUTA?

Answer:

Only services performed directly in the employ of a church or convention or association of churches, as distinguished from any other organization, are excluded under subparagraph (A). The exclusion in (B) involves a two part test: (1) Is the employer some other organization than the church or a convention or association of churches? (2) Are the services performed for an organization which is (operated, supervised, controlled, or principally supported by a church, or convention or association of churches) operated primarily for religious purposes?

The fact that the organization is owned, operated, supervised and controlled by a church does not justify a conclusion that the services performed for the organization are performed in the employ of the church rather than the organization. Ownership does not necessarily signify exclusive possession and control. Ownership may be retained concurrently with the creation and exercise of other legal interests. Furthermore, the form under which the organization is operated, supervised or controlled may be distinct from that entity which operates, supervises and controls the religious activities of the church, even though the church retains ownership of the organization and even if the same individuals comprise the authority of both the organization and the church.

With respect to the second test, if the services are performed for an organization other than the church, the

services may be excluded *only* if the organization (which is operated, supervised, controlled or principally supported by a church or convention or association of churches) is operated primarily for religious purposes.

Supplement 2, 1976 Draft Legislation
February 2, 1977

Definitions — service for nonprofit organization, section 2(k)(1)(C), cont.
Refer: Commentary, page 25

Thus, under section 3309(b)(1), FUTA, it must first be determined whether the workers in question are employed by a church or by an organization other than the church. If the workers are employed by a church, their services are excluded. Whether the church is the employer is primarily a question of fact. If, however, the workers are not employed by the church, it must then be determined whether the employing organization is operated primarily for religious purposes. If operated primarily for religious purposes, the services are excluded only if the employing organization is operated, supervised, controlled or principally supported by the church.

The determination of whether the exclusion applies can be made only after a thorough analysis of the legal interests and relationships between the organization and the church.

The changes made in section 3309 by P.L. 94-566 do not change the application of the exclusions in section 3309 (b)(1)(A) and (B).

* * *

Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR., CLERK

NO. 80-120

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH and NORTHWESTERN LUTHERAN ACADEMY,

Petitioners,

v.

THE STATE OF SOUTH DAKOTA,

Respondent.

SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

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IN THE

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Petitioners,

v.

THE STATE OF SOUTH DAKOTA,

Respondent.

SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

Edward Thomas Schilling, on behalf of St. Martin Evangelical Lutheran Church and Northwestern Lutheran Academy submits this supplemental brief to the petition for a Writ of Certiorari to the Supreme Court of South Dakota to call to the attention of the United States Supreme Court intervening matter not available at the time of the original filing.

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ADDITIONAL REASON FOR GRANTING THE PETITION

THERE IS NOW A DIRECT CONFLICT BETWEEN THE SUPREME COURT OF SOUTH DAKOTA AND A UNITED STATES COURT OF APPEALS IN DECIDING THE SUBSTANTIAL FEDERAL QUESTIONS INVOLVED.

We previously pointed out that the Supreme Courts of the States of South Dakota and North Dakota decided the federal questions involved in direct conflict with one another. (Petition for Writ of Certiorari, pp. 13 and 14)

Now there is a conflict between the decision of the Supreme Court of South Dakota and a United States Court of Appeals. On September 8, 1980, the United States Court of Appeals for the Fifth Circuit overruled the United States Secretary of Labor by holding that church elementary and secondary schools were exempt from coverage under the federal unemployment compensation laws. *Alabama and Nevada v. Marshall,* — F.2d — (No. 79-3968 and 79-4032, 5th Cir., decision filed September 8, 1980). Because this decision is not yet reported, it is set forth in the Appendix herein (Appendix, pp. A-1 - A-6)

Because of this new conflict and the extensive litigation pending throughout the nation involving the significant federal questions involved we again respectfully request

that the petition for a writ of certiorari to the Supreme Court of South Dakota be granted.

Respectfully submitted,

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September, 1980

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-3968

STATE OF ALABAMA,
Petitioner,

v.

RAY MARSHALL, SECRETARY OF LABOR,
Respondent.

No. 79-4032

STATE OF NEVADA,
Petitioner,

v.

RAY MARSHALL, SECRETARY OF LABOR,
Respondent.

Petitions for Review of Orders of the
Department of Labor

(SEPTEMBER 8, 1980)

Before COLEMAN, Chief Judge, RONEY and GARZA, Circuit Judges. GARZA, Circuit Judge:

The question presented for our determination is whether the Unemployment Compensation Amendments of

1976[1] discontinued the Federal Unemployment Tax Act (FUTA)[2] exemption for employees of elementary and secondary church schools. For an understanding of the present controversy a brief review of the relevant FUTA exemptions is in order.

Prior to 1970, FUTA did not require states' unemployment compensation programs to include nonprofit organizations, such as hospitals and schools, within their unemployment compensation coverage. The Employment Security Amendments of 1970[3] required states' programs to include these organizations within their coverage, but the amendments provided two express exemptions of importance to this case. 26 U.S.C. §3309(b)(1) provided an exemption for service performed:

> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches.

Section 3309(b)(3) provided an exemption for service performed "in the employ of a school which is not an institution of higher education."

In 1976, Congress deleted the exemption contained in §3309(b)(3) thereby requiring coverage of elementary and secondary schools. Following the 1976 amendments, Petitioners, Alabama and Nevada, modified their compensation laws to delete the corresponding exemptions within their program coverage.[4] After over a year of equivocation, the Secretary of Labor took the official position that the deletion of §3309(b)(3) required coverage of services performed in all elementary and secondary schools, including church schools. The Secretary's position was and remains that §3309(b)(1)(B) has no

application to church schools and that §3309(b)(1)(A) applies only to "those strictly church duties performed by church employees at the school pursuant to their church responsibilities."[5] Alabama and Nevada refused to follow the Secretary's interpretation of the law[6] and the Secretary instituted administrative proceedings to withhold certification of Petitioner's compensation programs. After an evidentiary hearing the Administrative Law Judge determined that the Secretary's position was erroneous and recommended that the Petitioner's programs be certified.[7] Feeling that the term "church" should be narrowly defined to include only the physical house of worship, the Secretary rejected the recommendation of the Administrative Law Judge on October 31, 1979 and the Petitioners now seek review of the Secretary's ruling.

The Petitioners contend that sectarian elementary and secondary schools remain exempt under the "plain language" of §3309(b)(1)(A) because the services performed by employees of these schools are performed in the "employ of a church." In support of their argument that church schools are within the statute's meaning of "church", the Petitioners point to the uncontradicted evidence in the administrative record showing that: many of the church schools have no separate legal existence from their church; the school employees are hired, controlled, disciplined and fired by church representatives and officials; school buildings are owned by the church; and school employees are paid with funds drawn from the church accounts. To support their argument that employees of church schools are in fact employees of the church the Petitioners point to 26 U.S.C. §3306(a)(1) which defines "employer" and "any person who . . . paid wages." Additionally, 26 C.F.R. §31.3121(d)-1(c)(2)

(1979) explains that an employer-employee relationship exists when the employer has a right to control the manner in which services are performed, has the right to discharge the person performing the services, and furnishes the place of work. Lastly, the Petitioners cite many cases which recognize that services performed by parochial schools are an "integral part" of the religious mission of the governing church. *NLRB v. Catholic Bishop,* 440 U.S. 490 (1979); *Meek v. Pittenger,* 421 U.S. 349 (1975); *Lemon v. Kurtzman,* 403 U.S. 602 (1971).

Although both sides of this case point to evidence of Congressional intent favoring their positions, the law is well settled that a statute must be interpreted according to its plain language unless a clear contrary legislative intention is shown. *See NLRB v. Catholic Bishop, supra; U.S. v. Apfelbaum,* — U.S. — (1980). Regarding §3309 (b) (1) (A), we can find no clear Congressional intention to desire a result contrary to its plain language. The statute plainly indicates that the exemption is contingent upon who the employer is and is not contingent upon the type of services the employee is performing. There is no question here that the persons performing services in these religious schools fall within the "in the employ of" language of the statute, therefore, if the employees involved are employed by a "church", the exemption applies to them. Resolution of this question depends upon what is meant by "church" as used in the statute. We are convinced that the plain meaning of "church" requires a definition as something qualitatively greater than the physical building of worship and, at a minimum, the term encompasses the legal entity commonly referred to as a church. The Secretary would avoid the legal consequences of this definition by excluding the very people which comprise a church as an entity and perform its

functions. For this court to adopt such a limited definition would be for us to ignore the historic function of churches and defy the definition of the word as used in our vocabulary.

If Congress desires to change the established exemption of unemployment compensation coverage for elementary and secondary parochial school employees, it is well within its ability to amend the law to reflect that desire by drafting a clear statement to that effect. But, it is not the responsibility or function of this court to perform linguistic gymnastics in order to upset the plain language of Congress as it exists today.

Petition for Reveiw is GRANTED and the Decision of the Secretary of Labor is hereby SET ASIDE.

FOOTNOTES

[1] Pub. L. No. 94-566, 90 Stat. 2667.

[2] 26 U.S.C. §3301 *et seq.*

[3] Pub. L. No. 91-373, 84 Stat. 695.

[4] Ala. Code §25-4-10(b)(21); Nev. Rev. Stat. §612.121 (1977).

[5] Unemployment Insurance Program Letter No. 39-78 (May 30, 1978).

[6] The Alabama Department of Industrial Relations refused to comply with the Department of Labor's directive after having been enjoined to do so as a consequence of litigation of this issue in the state courts.

[7] The Administrative Law Judge relied upon both §3309 (b)(1)(A) and (B) and based his recommendation for certification on several reasons: the "plain language" of the statute; the Congressional intent and history; and the probability of state-church "entanglement". We express no opinion on the various holdings of the Administrative Law Judge, but rest our opinion solely on the "plain language" of §3309(b)(1)(A).

Supreme Court, U.S.
FILED
DEC 12 1980
MICHAEL RODAK, JR., CLERK

NO. 80-120

In the Supreme Court of the United States

OCTOBER TERM, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH and NORTHWESTERN LUTHERAN ACADEMY,

Petitioners,

v.

THE STATE OF SOUTH DAKOTA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

JOINT APPENDIX

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Counsel for Respondent

PETITION FOR CERTIORARI FILED
JULY 25, 1980
CERTIORARI GRANTED NOVEMBER 3, 1980

NO. 80-120

In the Supreme Court of the United States

OCTOBER TERM, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH and NORTHWESTERN LUTHERAN ACADEMY,

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v.

THE STATE OF SOUTH DAKOTA,

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

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Petitioners Assignment of Errors dated November 17, 1978, to Hughes County Circuit Court, Sixth Judicial Circuit, for the State of South Dakota A-9

Memorandum Decision by Judge Robert A. Miller, Hughes County Circuit Court, Sixth Judicial Circuit, for the State of South Dakota dated March 19, 1979

The decision by Judge Miller appears in the Appendix to the Petition for Writ of Certiorari .....Pet. App. A-25

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May 5, 1978

Letter from Gene Kennell, Field Service Chief, South Dakota Department of Labor — Unemployment Insurance Division to Petitioner, Northwestern Lutheran Academy, advising Petitioner of coverage under South Dakota Unemployment Insurance Law

May 12, 1978

Letter from Petitioner, Northwestern Lutheran Academy, to Appeals Referee for South Dakota Department of Labor — Unemployment Insurance Division requesting hearing to determine liability for coverage under South Dakota Unemployment Compensation Insurance Law

May 31, 1978

Letter from Petitioner, St. Martin's Evangelical Lutheran Church, to South Dakota Department of Labor — Unemployment Insurance Division requesting hearing to determine liability for coverage under South Dakota Unemployment Compensation Insurance Law.

June 22, 1978

Notice of Hearing on July 19, 1978 by Appeals Referee, South Dakota Department of Labor — Unemployment Insurance Division, to Northwestern Lutheran Academy

June 22, 1978

Notice of Hearing on July 19, 1978 by Appeals Referee, South Dakota Department of Labor — Unemployment Insurance Division, to St. Martin's Lutheran School

July 19, 1978

Administrative Hearing before Appeals Referee, South Dakota Department of Labor — Unemployment Insurance Division

Sept. 15, 1978

Administrative Decision by Appeals Referee, South Dakota Department of Labor — Unemployment Insurance Division

Oct. 5, 1978

Notice of Appeal of Administrative Decision by Petitioners to Hughes County Circuit Court, Sixth Judicial Circuit, for the State of South Dakota filed

Nov. 20, 1978

Petitioners' Assignment of Errors to Hughes County Circuit Court, Sixth Judicial Circuit, for the State of South Dakota filed

Dec. 13, 1978

Argument on Appeal to Hughes County Circuit Court, Sixth Judicial Circuit, for the State of South Dakota

March 20, 1979

Memorandum Decision dated March 19, 1979, by Judge Robert A. Miller, Hughes County Circuit Court, Sixth Judicial Circuit, for the State of South Dakota filed

April 2, 1979

Judgment by Hughes County Circuit Court, Sixth Judicial Circuit, for the State of South Dakota filed

April 6, 1979

Notice of Entry of Judgment by Hughes County Circuit Court, Sixth Judicial Circuit, for the State of South Dakota filed

May 25, 1979
Respondent's Notice of Appeal to the Supreme Court of South Dakota filed

June 16, 1979
Respondent's Assignments of Error to the Supreme Court of South Dakota filed

Oct. 10, 1979
Argument on Appeal before Supreme Court of South Dakota

March 26, 1980
Opinion dated March 26, 1980 by Supreme Court of South Dakota filed

April 14, 1980
Petition for Rehearing by Petitioners to Supreme Court of South Dakota filed

May 2, 1980
Petition for Rehearing Denied by Supreme Court of South Dakota

STATE OF SOUTH DAKOTA IN CIRCUIT COURT

COUNTY OF HUGHES SIXTH JUDICIAL CIRCUIT

In the Matter of the Determination of Unemployment Insurance Coverage of Northwestern Lutheran Academy and St. Martin's Evangelical Lutheran Church School

NOTICE OF APPEAL

TO: THE SOUTH DAKOTA DEPARTMENT OF LABOR, UNEMPLOYMENT INSURANCE DIVISION

PLEASE TAKE NOTICE that the Northwestern Lutheran Academy and St. Martin's Evangelical Lutheran Church School, hereinafter referred to as Appellants, hereby appeal the Administrative Decision of the South Dakota Department of Labor, Unemployment Insurance Division, dated September 15, 1978, to the Circuit Court of the Sixth Judicial Circuit, State of South Dakota, County of Hughes.

YOU ARE FURTHER HEREBY NOTIFIED that the Administrative Decision appealed from held that St. Martin's Evangelical Lutheran Church School and the Northwestern Lutheran Academy are employers subject to coverage by the South Dakota Unemployment Insurance Law and that female teachers at those schools are not exempt from coverage.

YOU ARE FURTHER HEREBY NOTIFIED that the substantial rights of the Appellants have been prejudiced because the Administrative Decision is in violation of the First Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment to the Constitution of the United

States, and in violation of Article VI, Section 3 of the Constitution of the State of South Dakota, is affected by other error of law, is clearly erroneous in light of the entire evidence in the record, and is arbitrary, capricious, and characterized by abuse of discretion.

Dated this 3rd day of October, 1978.

SIEGEL, BARNETT, SCHUTZ,
O'KEEFE, JEWETT & KING
500 Capitol Building, Box 1269
Aberdeen, South Dakota 57401

Rory King
Attorneys for Appellants

(Certificate of Service Omitted in Printing)

STATE OF SOUTH DAKOTA IN CIRCUIT COURT

COUNTY OF HUGHES SIXTH JUDICIAL CIRCUIT

In the Matter of the Determination of Unemployment Insurance Coverage of Northwestern Lutheran Academy and St. Martin's Evangelical Lutheran Church School

ASSIGNMENT OF ERRORS

The above named Appellants, by their attorneys, Von Briesen & Redmond, S.C., and Siegel, Barnett, Schutz, O'Keefe, Jewett & King, hereby assign the following errors in the Administrative Decision of the Appeals Referee dated September 15, 1978, and a part of the files and records herein, and state that the Court should reverse said Decision because said Decision prejudices the substantial rights of Appellants, and because the inferences, conclusions and decisions contained therein are contrary to the applicable law and are unsupported by substantial evidence, to-wit:

1. The Referee erred in concluding on Page 5 of the Opinion that St. Martin's Evangelical Lutheran Church School and Northwestern Lutheran Academy are employers subject to the South Dakota Unemployment Insurance laws.
2. The Referee erred in concluding on Page 5 of the Opinion that the term "church" has been interpreted to the states to be used, within the context of unemployment insurance coverage, in a limited sense and to be synonomous with an individual "house of worship" maintained by a particular congregation.
3. The Referee erred in concluding on Page 5 of

the Opinion that the employees in question are not employed by a church within the meaning of such term and in concluding that the employees in question are employed by a school.

4. The Referee erred in concluding on Page 6 of the Opinion that the primary purpose of the schools is educational and not religious.

5. The Referee erred in concluding on Page 6 of the Opinion that the female teachers are not members of a religious order in the exercise of duties required by such order.

6. The Referee erred in rejecting, on Page 6 of the Opinion, Appellant's argument that the extension of coverage to certain employees of Northwestern Lutheran Academy and St. Martin's Evangelical Lutheran Church involves excessive entanglement by the state contrary to the First Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment to the Constitution of the United States, and contrary to Article VI, Section 3, of the Constitution of the State of South Dakota.

7. The Referee erred in concluding in the Decision that the services rendered at Northwestern Lutheran Academy and St. Martin's Evangelical Lutheran Church are not excluded from the South Dakota Unemployment Insurance laws under Sec. 61-1-10.4(1)(a), (b) or 61-1-10.4(2).

WHEREFORE, Appellants pray that the Administrative Decision of the Appeals Referee be reversed.

Dated this 17th day of November, 1978.

VON BRIESEN &
REDMOND, S.D.
757 North Broadway
Milwaukee, Wisconsin 53202

-and-

SIEGEL, BARNETT, SCHUTZ,
O'KEEFE, JEWETT & KING
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Aberdeen, South Dakota 57401

By Rory King
Attorneys for Appellants
Northwestern Lutheran
Academy and St. Martin's
Evangelical Lutheran Church
School

(Certificate of Service Omitted in Printing)

STATE OF SOUTH DAKOTA IN CIRCUIT COURT

COUNTY OF HUGHES SIXTH JUDICIAL CIRCUIT

IN THE MATTER OF THE DETERMINATION OF UNEMPLOYMENT INSURANCE COVERAGE OF NORTHWESTERN LUTHERAN ACADEMY AND ST. MARTIN'S EVANGELICAL LUTHERAN SCHOOL.

CIV. NO. 78-248

NOTICE OF APPEAL

TO: NORTHWESTERN LUTHERAN ACADEMY AND ST. MARTIN'S EVANGELICAL LUTHERAN CHURCH SCHOOL AND THEIR ATTORNEY RORY KING.

Notice is hereby given that the State of South Dakota does hereby appeal to the Supreme Court of the State of South Dakota from the whole of the decision and judgment made and entered in the above-entitled action, said judgment being filed in the office of the clerk of the Circuit Court, Sixth Judicial Circuit, in and for the County of Hughes, State of South Dakota, on the 2nd day of April, 1979, and from the whole of the record in said action.

Dated this 25 day of May, 1979.

MARK V. MEIERHENRY
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(Certificate of Service Omitted in Printing)

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

IN THE MATTER OF THE DETERMINATION OF UNEMPLOYMENT INSURANCE COVERAGE OF NORTHWESTERN LUTHERAN ACADEMY AND ST. MARTIN'S EVANGELICAL LUTHERAN SCHOOL.	ASSIGNMENTS OF ERROR
	Civil No. 78-248

The Appellant, State of South Dakota, by and through its Assistant Attorney General, Judith A. Atkinson, hereby makes the following Assignments of Error upon which it will rely on its appeal to the Supreme Court of South Dakota.

I.

The court erred in holding that employment by church-related nonprofit elementary and secondary schools is exempt from unemployment taxation by the State Department of Labor by reason of SDCL 61-1-10 and the general construction of that section.

II.

The court erred in failing to reach the constitutional issues presented in the case, and in failing to hold there is no conflict between religious freedom and the Employment Act.

Dated this 16 day of June, 1979.

MARK V. MEIERHENRY
ATTORNEY GENERAL

Judith A. Atkinson
Assistant Attorney General
State Capitol
Pierre, South Dakota 57501

(Certificate of Service Omitted in Printing)

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE DETERMINATION OF UNEMPLOYMENT INSURANCE COVERAGE OF NORTHWESTERN LUTHERAN ACADEMY AND ST. MARTIN'S EVANGELICAL LUTHERAN CHURCH	File No. 12801 PETITION FOR REHEARING

The petitioners, Northwestern Lutheran Academy and St. Martin's Evangelical Lutheran Church, by their attorneys, von Briesen & Redmond, S.C., and Siegel, Barnett, Schutz, O'Keefe, Jewett & King, as their petition for a rehearing respectfully state that:

1. In holding that the court must show great deference to the interpretation given the statute by the U.S. Department of Labor, the court was not aware of the decision of the Administrative Law Judge in the Conformity Proceedings for Alabama and Nevada (attached as Exhibit A), which decision was made public after oral argument in this case. The court was also not aware of the Memoranda from the U.S. Department of Labor signed by Lawrence E. Weatherford, Jr., Administrator, Unemployment Insurance Service dated December 7, 1976, and February 2, 1977 (Exhibits B and C attached) to all State Agency Administrators and all Regional Administrators, Employment and Training Administrators, which Memoranda were contemporaneous interpretations by the U.S. Department of Labor and wherein the Department of Labor concluded that "the changes made in Section 3309 by P.L. 94-566 do not change the application of the exclusions in Section 3309(b)(1)(A) and (B)." The memoranda are discussed in the Administrative Law Judge's decision in the conformity proceedings of Alabama and Nevada.

2. The court misapprehended the principle of statutory construction that when the words of a statute are clear, the plain language of the statute is controlling and resort to administrative interpretation or legislative history is not appropriate.

3. In holding that the court must give great deference to the interpretation given the statute by the U.S. Department of Labor, the court overlooked the prior congressional history of the term "church" under the tax laws of the U.S. and administered by the Internal Revenue Service and the U.S. Treasury Department.

4. In holding that the 1970 amendments to FUTA evidenced an intent by Congress to cover church related schools, the court overlooked the inherent differences recognized by the U.S. Supreme Court between the college level and the elementary and secondary level of education at church affiliated schools (*Tilton v. Richardson,* 403 U.S. 672 [1971]).

5. In holding that the estimated 242,000 new employees who would be covered as a result of the repeal of the exemption for elementary and secondary schools was significant, the court misapprehended the fact that the Census Bureau's statistical abstract of the U.S. cited by the Department of Labor states that there are 261,000 full-time teachers alone in non-profit elementary and secondary schools in 1975, a figure which does not include the support personnel of the school such as administrators, secretaries, maintenance, food service, etc., all of whom must be covered under the Department of Labor's interpretation and would swell the number of employees of non-profit elementary and secondary schools far beyond 242,000 if services in church related schools were covered.

6. In recognizing the entanglement between the church and state but distinguishing the U.S. Supreme Court decision in *NLRB v. Catholic Bishops of Chicago,* 99 S. Ct. 1313, 59 L. Ed.2d 533 (1979) on the grounds that "the minimal entanglement that might result in the present case, however, does not approach the potential effect, noted in *Catholic Bishop*. . .", the court misapprehended the U.S. Supreme Court test set forth in *Catholic Bishop:*

> The Board argues that it can avoid excessive entanglement since it will resolve only factual issues . . . but at this stage of our consideration we are not compelled to determine whether the entanglement is excessive as we would were we considering the constitutional issue. Rather, we make a narrow inquiry whether the exercise of the Board's jurisdiction presents a significant risk that First Amendment will be infringed. [59 L. Ed.2d at p. 542]
>
> Accordingly, in the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the court to resolve difficult and sensitive questions arising out of guarantees of the First Amendment religion clauses. [59 L. Ed.2d at p. 545]

In applying the test under *Catholic Bishop,* the court overlooked prior congressional history of the term "church", the contemporaneous interpretation by the U.S. Department of Labor in 1976 and 1977 and the memo by the U.S. Department of Labor solicitor, Carin Ann Clauss (Administrative Record — State Exhibit #2) in which she recommended:

> Obviously, if subsection (1) applied to church-related elementary and secondary schools prior to the 1976 amendments it continues to apply since the leg-

islative history is silent . . . Option 3 would apply (1) in all circumstances based upon the silent legislative history of the 1976 amendments and avoidance of possible constitutional involvement.

7. In holding that the Unemployment Compensation Tax Law is not invalid as applied to the petitioners, the court misapprehended the constitutional issue of the excessive entanglement of church and state which invalidates the statute as applied to the petitioners.

Based upon the above-described grounds, petitioners respectfully request a rehearing in this matter.

Dated this 8 day of April, 1980.

Respectfully submitted,

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and

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EXHIBIT A

U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

October 11, 1979

MEMORANDUM FOR: THE SECRETARY

FROM: NAHUM LITT
Chief Administrative Law Judge

SUBJECT: United States Department of Labor v. State of Alabama Department of Industrial Relations and State of Nevada Employment Security Department

Pursuant to the Notice of Hearing and Rules of Procedure pertaining to the above-captioned conformity proceeding, I am enclosing for your consideration the original and one copy of the Recommended Decision herein.

Copies are simultaneously being served on counsel of record for the parties, the interested parties and those states against whom proceedings were commenced but continued.

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Suite 700-1111 20th Street, N.W.
Washington, D.C. 20036

UNITED STATES DEPARTMENT
OF LABOR

vs.

STATE OF ALABAMA
DEPARTMENT OF INDUSTRIAL
RELATIONS and STATE OF
NEVADA EMPLOYMENT
SECURITY DEPARTMENT[1]

Conformity
Proceeding

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Before: WILLIAM A. GERSHUNY
Administrative Law Judge

RECOMMENDED DECISION

This case arises out of the Secretary's interpretation of the 1976 amendment to Section 3309(b) of the Federal Unemployment Tax Act, 26 U.S.C. 3309(b) (hereafter "FUTA"), as requiring extension of unemployment compensation coverage by the states to employees of primary and secondary religious schools. Two states, Alabama and Nevada, construe the statutory provision as exempting such schools from coverage and have been determined by the Secretary to be in noncompliance with FUTA. At stake is their entitlement, under 42 U.S.C. 502-504, to millions of dollars annually through Department of Labor grants to pay for the costs of administering their unemployment laws. At issue is whether Congress intended, under Sec. 3309(b) of FUTA, to provide unemployment compensation benefits to employees of such schools and to fund the program on the basis of an excise tax imposed on the religious schools.[2]

For the reasons expressed herein, I conclude that Congress did not so intend and, accordingly, I recommend that the States be certified by the Secretary as entitled to federal grants to pay for the costs of administering their unemployment laws.

I

Procedurally, this case was initiated by the Secretary's filing of a notice of Hearing on August 10, 1979. The commencement of this proceeding was preceded by the Secretary's formal notification to the States of their noncompliance by letter dated July 6, 1979 and their requests for a hearing on July 16 (Alabama) and 17 (Nevada). The Secretary's Notice scheduled the hearing for September 5, 1979 in Washington, D.C. and established rules of procedure which, *inter alia,* required the issuance of a recommended decision by not later than October 17, 1979 and otherwise forbade the administrative law judge from granting continuances which would prevent the issuance of the decision by that date. By Order dated August 10, 1979, a prehearing conference was scheduled for August 27, 1979 to consider stipulation of the record. In addition, pretrial discovery was preliminarily banned. Over the course of several weeks, under the direct supervision of the administrative law judge, the parties were able to stipulate virtually all the facts relating to the state laws and their impact on church schools and to the organization of Catholic, Baptist and Lutheran church schools and their academic programs. An evidentiary hearing was held on September 26, 1979, briefs submitted thereafter and oral argument heard on October 9, 1979. On September 25, one day prior to the hearing, the Secretary offered to consent to a continuance of the hearing and to certify the states as in compliance in 1979, if the states would agree to such a continuance *prior* to the commencement of the administrative hearing. On the morning of the hearing, four states so agreed and the proceedings involving them were severed and continued generally. Alabama and Nevada's counterproposal to proceed with the hearing so as not to unduly inconvenience the

large number of out-of-town counsel and then stay further proceedings was rejected by the Secretary.

Against this procedural backdrop, the states contend that they have been denied procedural due process in that their opportunity for an administrative hearing was grossly restricted by the Secretary's delay in commencing the proceeding and his requirement that a decision be rendered by the administrative law judge by October 17. Whatever the merits of this contention might be, it is clear that, under the Secretary's *ad hoc* rules of procedure, I lack authority to consider and decide the issue. Rule 4 requires issuance of the recommended decision by October 17 and, the record will reflect, there was no remaining time for discovery or other trial preparation. In any event, there is nothing in this record to reflect that either of the states was deprived of an opportunity to offer evidence which it considered vital to its case.

II

The Federal Unemployment Tax Act (FUTA) had its roots in the fertile fields of New Deal legislation of the 1930's. In its original version, 49 Stat. 620, FUTA imposed an excise tax on "for profit" employers with eight or more employees and, as an incentive for the enactment of State unemployment compensation laws, allowed covered employers a credit against federal tax liability for up to 90% of contributions to a federally approved state program and provided for grants to states with qualifying programs to pay for costs of administration. As a consequence, all states enacted mirror images of FUTA.

Coverage was broadened in 1970 with enactment of the Employment Security Amendments Act, 84 Stat. 695,

which imposed the tax on employers of one or more employees and redefined employer to include non-profit organizations. Included in the 1970 amendments was a new section 3309 to the Internal Revenue Code of 1954, which nevertheless continued the prior exemption of services performed

> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches;
>
> (2) by a duly ordained, commissioned or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;
>
> (3) in the employ of a school which is not an institution of higher education;

In 1974, to combat a severe economic downturn, Congress enacted a Special Unemployment Assistance Program (SUA), 83 Stat. 1845, which temporarily provided benefits, at the sole expense of the federal government, to employees of non-profit elementary and secondary schools, who were not covered under the regular program. Because such non-profit schools were not subjected to any tax liability under the SUA program, there was no occasion to consider constitutional implications of the legislation.

However, the SUA program soon was replaced by the Unemployment Compensation Amendments of 1976, 90 Stat. 2667, which, in relevant part, deleted subsection (3) of Section 3309(b). Construing this amendment as evi-

dence of a Congressional intent to provide permanent coverage to all employees of church elementary and secondary schools (except ministers and those performing strictly church duties in the schools) the Department initiated this proceeding to determine whether Alabama and Nevada, which otherwise construed the amendment, are maintaining a "conforming" unemployment compensation program and, thus, are eligible for massive federal grants.

III

Essentially all the facts relevant to the issues presented have been stipulated by the parties. Because no recommended findings need be made, the facts will be summarized only.

Alabama's initial efforts to provide coverage for employees of church related elementary and secondary schools were enjoined permanently on January 29, 1979, in *Trinity Evangelical Lutheran Church v. Department of Industrial Relations,* No. CV 78 500325, Cir. Court Mobile County, and preliminarily enjoined on January 22, 1979 in another suit filed by Baptist and Methodist churches. The State volunarily dismissed its appeal of the former and thereafter ceased its efforts to compel church schools in Alabama to pay unemployment taxes.

Nevada came into "non-compliance" with its factual determination that Roman Catholic elementary and secondary schools, under the State equivalent of subsection (b)(1), were exempt because services in those schools were performed in the employ of the church or a church-controlled organization operated primarily for religious purposes. For purposes of this proceeding, the Department does not challenge the State's factual conclusions.

Roman Catholic elementary and secondary schools are operated and controlled by the Bishop of the Diocese, have no separate corporate existence, were founded for religious reasons and teach otherwise secular subjects with religious content. Principals are priests, subject to direct control of the appropriate parish priest. Student participation in religious exercises is an integral part of the curriculum. Operating funds are derived principally from church members. Only 3-5% of the lay teachers are non-Catholic. Teachers are employed by the principal and parish priest, are paid by the Diocese, teach subjects with religious content and perform religious duties, and are subject to discharge for not fulfilling the Church's religious mission.

Baptist churches are tax-exempt corporations whose members are fundamental Bible believers. Its day schools are considered as integral and functional parts of the church, occupy the same facilities as the church, are controlled and supported by the maintaining church. Superintendents are ordained ministers or graduates of religiously oriented colleges. Religious instruction is mandatory, "secular" subjects are taught in conformity with church doctrine, textbooks are published by religious institutions and operating funds are derived from the church budget. Teachers are either ordained ministers or other certified individuals, are hired by the superintendent and paster, are subject to discharge for breach of religious doctrine and must be members of the church.

Lutheran elementary and secondary schools are controlled and operated by the church, which is a tax-exempt corporation. It selects the curriculum and hires and supervises the school staff. The curriculum is similar to that of secular schools. Operating funds are derived by the

church and student tuition. Teachers are paid from church funds and school facilities, often located in the church building, are owned by the church. Teachers are subject to discharge for failure to teach church doctrine by word and personal example, both inside and outside the classroom. Religious instruction is required and all subjects are taught in conformity with church doctrine.

If such schools are covered under FUTA, they would be required to maintain employment records, to file periodic reports with the states and respond to individual claims for benefits; would be subject to periodic examination as to the amount of their contributions and administrative inquiries as to the nature and extent of covered services; and would be subject to civil and criminal enforcement procedures. The states would be required to determine whether a claimant was dischargd for misconduct or voluntarily left his employment without good cause.

IV

The Department's position in this proceeding is somewhat elusive. On the one hand, it asserts that Congressional deletion of the school exemption in subsection (3) "militates strongly in favor of construing the statute to cover *all* elementary and secondary schools, including those organized by the churches. . ." (Brief p. 11) and that the religious purposes exemption of subsection (1) "is not available as an exemption because coverage of elementary and secondary school activity was intended by Congress . . . [and] to conclude otherwise would be to carve out a special rule based upon religious motivation offending the Establishment Clause of the First Amendment to the Constitution" (Brief p. 22). On the other hand, it asserts that subsection (2) exempts ordained min-

isters and members of religious orders in the exercise of their religious duties in such schools and that the performance of church duties (as distinguished from school duties) by church employees at the schools pursuant to their church responsibilities likewise is exempt under 3309(b)(1). (Brief p. 2)

More specifically, it contends that the words "in the employ of a church" in subsection (b)(1) is intended to refer not to the employing entity, i.e. the religious organization, but rather to the function being performed by the employee, e.g. teaching. The word "church", it argues, refers to the house of worship and not the organization. Thus, for example, a lay employee of a religious organization teaching religious doctrine at an elementary school conducted by that organization in its house of worship would be covered under FUTA and the exemptive provisions of subsection (b)(1) would be inapplicable.

Its position as to the interpretation of 3309, it argues, raises no constitutional issues because coverage of church schools under FUTA does not create execessive governmental entanglements with the church. In this connection, it contends that neither the program's record-keeping and filing requirements nor its administrative inquiries as to elegibility for benefits would require the government "to become involved in such issues as resolving disputes as to church doctrine in order to resolve claims for benefits" (Brief p. 17).

Not only is the Department's position as to the meaning of section 3309(b) elusive, it has not remained constant. Shortly after enactment of the 1976 amendments, which in part deleted subsection (3) of section 3309(b), the Department formally advised the states that the effect of

this change is to mandate coverage of elementary and secondary schools operated by the State and its political subdivisions or by nonprofit organizations" (ALJ Exh. 2, pp. 24-25). Coverage of church schools was not suggested. Thereafter, in a December, 1976 Department memorandum to the states, the following question and answer appeared:

> *Question:*
>
> Do the 1976 amendments affect church related schools?
>
> *Answer:*
>
> Yes, to the extent that coverage is extended to elementary and secondary schools. In other respects no changes were made, and the exclusion in sections 3309(b)(1), (2) . . . are still applicable. . . . For example, the coverage of nonprofit elementary and secondary schools does not affect the optional exclusion in 3309(b)(1).

(ALJ Exh. 3, p. 5). Having thus affirmed the applicability of the exemptive provisions of section 3309(b)(1) to church schools, the Department went on, in a February, 1977, memorandum to the states, to explain the criteria for determining applicability of the provision:

> Thus, under section 3309(b)(1), FUTA, it must first be determined whether the workers in question are employed by a church or by an organization other than the church. If the workers are employed by a church, their services are excluded. Whether the church is the employer is primarily a question of fact. If, however, the workers are not employed by the church, it must then be determined whether the employing organization is operated primarily for religious purposes. If operated primarily for religi-

> ous purposes, the services are excluded only if the employing organization is operated, supervised, controlled or principally supported by the church.
>
> The determination of whether the exclusion applies can be made only after a thorough analysis of the legal interests and relationships between the organization and the church.
>
> The changes made in section 3309 by P.L. 94-566 do not change the application of the exclusions in section 3309(b)(1)(A) and (B).

(ALJ Exh. 4, pp. 6-7). Significant is the Department's interpretation of the words "in the employ of a church" as meaning the "employing organization" and not, as presently contended, the physical structure where religious functions are performed.

By April, 1978, the Department tacitly rejected its earlier contemporaneous construction of the 1976 amendments and formally adopted the position asserted in these proceedings (DOL Exh. 1). By memoranda dated May 30, 1978 (DOL Exh. 2) and November 13, 1978 (ALJ Exh. 7), the Department advised the states that church related elementary and secondary schools were covered and the exemptive provisions of subsection (b)(1)(A) and (B) have no application to church activities performed in church related elementary and secondary schools "since schools are not churches within the meaning of that section" (DOL Exh. 2, p. 2).

The position of Alabama and Nevada, supported by a number of religious organizations, is that church schools, being an integral part of the governing church and fundamentally religious in character, are exempt from coverage under the plain language of section 3309(b)(1)

(A) and/or (B). Moreover, they contend that, while the legislative history does not specifically address the status of church schools under section 3309(b)(1), it "plainly indicates" a Congressional intent to exempt all services where the church is the employing entity. And, finally, the States argue that the Department's construction of section 3309(b) is impermissible for the reason that it would render the legislation violative of the First and Fourteenth Amendments to the Constitution under the excessive entanglement doctrine established by the Supreme Court.

V

There is no lack of precedent as to the application of Section 3309(b)(1) to church elementary and secondary schools. In each of the three lower court decisions rendered to date, the Department's position has been flatly rejected as contrary to the plain meaning of the statute, unsupported by the legislative history and constitutionally impermissible. *Trinity Evangelical Lutheran Church v. Department of Industrial Relations,* Case No. CV 78 550325, Cir.Ct.Mobile County, Ala. (January 27, 1979); *Roman Catholic Church v. State of Louisiana,* No. 219,660, 19th Jud.Dist.Ct., East Baton Rouge Parish, La. (August 31, 1979); *Grace Bretheren Church v. State of California,* Case No. CV 79-93, USDC, CDCal (September 21, 1979).

The precise contentions of the Department in this case were advanced by the State of Alabama in *Trinity Evangelical* and by the Department itself in *Grace Bretheren.* There, the courts reviewed the legislative history of FUTA, including the 1976 amendments which deleted the school exemption provisions of (b)(3); examined the teachings of the Supreme Court in *NRLB v. Catholic*

Bishop, 99 S.Ct. 1313 (1979) and *Lemon v. Kurtzman,* 403 U.S. 602 (1971); and considered the potential entanglement by the states in religious activities of the church. Their thoughtful and highly persuasive decisions are adopted here in their entirety, with the following additional comments.

First, a construction of the language "in the employ of a church" which looks to religious function and place of worship, rather than identification of the employing organization, plainly ignores the language employed by Congress not only in the statute itself, but also in its legislative history (H.R.Rept 612, 91st Cong., 1st Sess. 44; "where the employer is the church. . . ."). Moreover, earlier contemporaneous interpretations of the Department's Unemployment Insurance Service, which presumably worked closely with the Congress in the original enactment and subsequent amendment of Section 3309, advised the states that the determination to be made under (b)(1) was the identity of the "employing organization" (ALJ Exh. 4).

Second, the Department's reliance on a reference in the legislative history to the figure of 242,000 employees in all non-profit elementary and secondary schools as evidence of Congressional intent to cover employees of church schools is wholly misplaced. Department testimony in this case reflects that the figure is without meaning unless accompanied by the raw data and, admittedly, the record is silent as to Congressional understanding of the figure or the supporting data. In any event, a legislative cloak embracing integral church functions can hardly be woven with such a slender thread.

Third, the notion that complete Congressional silence in the legislative history evidences its intent to cover church schools by deleting the school exemption in sub-

section (b) (3) is unwarranted in the absence of definitive statutory language. Indeed, where, as here, the Congress manifested concern as to the constitutionality of its coverage of state employees in light of a recent Supreme Court decision (S.Rep. 94-1265, 94th Cong., 2d Sess. 8-9), yet failed even to address the more obvious constitutional question as to coverage of church schools, the only permissible inference to be drawn from that silence is that Congress was actually aware of the limitations of legislative authority and had not the slightest intention of entangling government in church function.

And fourth, the Department's construction of Section 3309(b) is inconsistent with government interpretations of the term "church", as used elsewhere throughout the Internal Revenue Code, to include church schools. See e.g., 26 C.F.R. 1.1508-1. Common sense, if nothing else, dictates that like terms in a statute be given like interpretations in the absence of a clearly expressed Congressional intention to the contrary. Admittedly, no such expression is to be found in the voluminous legislative history of FUTA.

RECOMMENDATION

For the foregoing reasons, it is recommended that the Secretary make a determination that the States of Alabama and Nevada are in compliance with the Federal Unemployment Tax Act and certify each to be entitled to federal grants to pay for the costs of administering their unemployment laws.

/s/ William A. Gershuny
WILLIAM A. GERSHUNY
Administrative Law Judge

Dated: October 11, 1979
Washington, D.C.

FOOTNOTES

1. Proceedings against four additional states, Tennessee, Washington, Texas and Michigan, were postponed by agreement of the parties. The following were granted interested party status with rights to submit briefs and participate in oral argument:

Alabama Association of Christian Schools
Tedd N. Williams, Esquire
Gibbs & Craze
6929 W. 130th Street
Cleveland, OH 44130

Roman Catholic Diocese of Nashville and Memphis
Dick Taylor, Esquire
300 James Robertson Parkway
Nashville, Tenn. 37201

United States Catholic Conference
George Reed, Esquire
Gerald C. Tobin, Esquire
1312 Massachusetts Ave. N.W.
Washington, D.C. 20005

General Conference of Seventh-day Adventists
Lee Boothby, Esquire
Suite 629
6930 Carroll Avenue
Washington, D.C. 20012

Martha Miles
Thomas G. Keith, Esquire
Legal Services
601 Terry-Hutchens Building
Huntsville, Ala. 35801

Lutheran Church-Missouri Synod
Philip E. Draheim, Esquire
17th Floor
515 Olive Street
St. Louis, Mo. 63101

2. At least one state, California, will continue to receive grant monies for the reason that it is "out of compliance" due to a preliminary injunction issued on September 21, 1979 by the United States District Court for the Central District of California in *Grace Brethren Church et al., v. State of California et al.,* No. CV 79-93.

EXHIBIT B

U.S. DEPARTMENT OF LABOR
Employment and Training Administration
Washington, D.C. 20213

MEMORANDUM FOR: ALL STATE AGENCY ADMINISTRATORS AND ALL REGIONAL ADMINISTRATORS, EMPLOYMENT AND TRAINING ADMINISTRATION

FROM: LAWRENCE E. WEATHERFORD, JR.
Administrator, Unemployment Insurance Service

SUBJECT: Supplement #1 — Questions and Answers Supplementing *Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976-P.L. 94-566*

Following enactment of H.R. 10210 (P.L. 94-566) and the issuance of *Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976-P.L. 94-566,* legislative planning meetings were

held in Washington, D.C., Atlanta, Georgia, Kansas City, Kansas and San Francisco, California. The enclosed questions and answers reflect inquiries made during these meetings.

The questions and answers are keyed to the applicable provision and its commentary in the *1976 Draft Legislation* and are issued as a supplement to it.

Please annotate your copies of the *1976 Draft Legislation* to reflect these additions.

Additional explanations and interpretations will be issued as needed and appropriate.

Enclosure

Supplement 1, 1976 Draft Legislation
December 7, 1976

* * *

Service excluded from required coverage of nonprofit organizations, section 2(k)(1)(D)
Refer: Commentary, page 25

1. *Question:*
Do the 1976 amendments affect church related schools?

Answer:
Yes, to the extent that coverage is extended to elementary and secondary schools. In other respects no changes were made, and the exclusion in sections 3309(b),(1), (2), (4), and (5) are still applicable. Accordingly the commentary on pages 27-30, *1970 Draft Legislation,* together with subsequent interpretations and explanations are still applicable.

For example, the coverage of nonprofit elementary and secondary schools does not affect the optional exclusion

in 3309(b)(1). The factors significant in determining whether or not service is performed

> "(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches"

remain unchanged.

Some of these matters were dealt with in various issues of Interpretation Series, P.L. 91-373 which are still pertinent.

* * *

EXHIBIT C

U.S. DEPARTMENT OF LABOR
Employment and Training Administration
Washington, D.C. 20213

MEMORANDUM FOR: ALL STATE AGENCY ADMINISTRATORS AND ALL REGIONAL ADMINISTRATORS, EMPLOYMENT AND TRAINING ADMINISTRATION

FROM: LAWRENCE E. WEATHERFORD, JR.
Administrator, Unemployment Insurance Service

SUBJECT: Supplement #2 — Questions and Answers Supplementing *Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976-P.L. 94-566*

By this time a number of draft proposals to implement the provisions of P.L. 94-566 have been sent to the National office for review. The enclosed questions and an-

swers reflect issues that have arisen in the course of that review.

The questions and answers are keyed to the applicable provisions and its commentary in the *1976 Draft Legislation* and are issued as the second supplement to it.

Please annotate your copies of the *1976 Draft Legislation* to reflect these additions.

Additional explanations and interpretations will be issued as needed and appropriate.

Enclosure

Supplement 2, 1976 Draft Legislation
February 2, 1977

* * *

Definitions — service for nonprofit organizations, section 2(k)(1)(C)
Refer: Commentary, page 25

1. *Question:*
Must an "organization" be a "legal entity" for the purposes of section 3309(b)(1), FUTA?

Answer:
No. Section 3309(b)(1) provides that service performed —

> "(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches"

may be excluded from the required coverage of governmental entities and nonprofit organizations.

The word "organization" is broader than the phrase "legal entity" and will include but not be limited to such

entities. Accordingly, an organization within the meaning of section 3309(b)(1) need not be a separate legal entity, but includes any organization other than the unit constituting a church or convention or association of churches, even though the organization may be so closely connected to the church, etc., as in fact to be operated, supervised or controlled by the church itself.

See also the Answer to Question 2 below.

2. *Question:*
What factors govern the application of the exclusions in section 3309(b)(1)(A) and (B), FUTA?

Answer:
Only services performed directly in the employ of a church or convention or association of churches, as distinguished from any other organization, are excluded under subparagraph (A). The exclusion in (B) involves a two part test: (1) Is the employer some other organization than the church or a convention or association of churches? (2) Are the services performed for an organization which is (operated, supervised, controlled, or principally supported by a church, or convention or association of churches) operated primarily for religious purposes?

The fact that the organization is owned, operated, supervised and controlled by a church does not justify a conclusion that the services performed for the organization are performed in the employ of the church rather than the organization. Ownership does not necessarily signify exclusive possession and control. Ownership may be retained concurrently with the creation and exercise of other legal interests. Furthermore, the form under which the organization is operated, supervised or controlled may be distinct from that entity which operates, super-

vises and controls the religious activities of the church, even though the church retains ownership of the organization and even if the same individuals comprise the authority of both the organization and the church.

With respect to the second test, if the services are performed for an organization other than the church, the services may be excluded *only* if the organization (which is operated, supervised, controlled or principally supported by a church or convention or association of churches) is operated primarily for religious purposes.

Thus, under section 3309(b)(1), FUTA, it must first be determined whether the workers in question are employed by a church or by an organization other than the church. If the workers are employed by a church, their services are excluded. Whether the church is the employer is primarily a question of fact. If, however, the workers are not employed by the church, it must then be determined whether the employing organization is operated primarily for religious purposes. If operated primarily for religious purposes, the services are excluded only if the employing organization is operated, supervised, controlled or principally supported by the church.

The determination of whether the exclusion applies can be made only after a thorough analysis of the legal interests and relationships between the organization and the church.

The changes made in section 3309 by P.L. 94-566 do not change the application of the exclusions in section 3309 (b)(1)(A) and (B).

U.S. DEPARTMENT OF LABOR
Employment and Training Administration
Washington, D.C. 20213

DIRECTIVE: UNEMPLOYMENT INSURANCE PROGRAM LETTER NO. 39-78

TO: ALL STATE EMPLOYMENT SECURITY AGENCIES

FROM: LAWRENCE W. ROGERS
Administrator
Field Operations

SUBJECT: Unemployment Insurance Coverage of Employees of Church-Related Nonprofit Elementary and Secondary Schools

1. *Purpose.* To inform SESAs of the following Secretary of Labor's decision concerning unemployment insurance coverage of employees of church-related nonprofit elementary and secondary schools: By repealing the former exclusion in section 3309(b)(3) of the Federal Unemployment Tax Act (FUTA) relating to services for education institutions, Congress clearly intended to extend coverage to services for church-related schools.

2. *References.* Sections 3304(a)(6) and 3309(a) and (b), FUTA, as enacted by Public Law 91-373 and amended by Public Law 94-566.

3. *Background.* In 1970, Congress extended unemployment insurance coverage to services for nonprofit organizations (and State hospitals and institutions of higher education) by requiring that State UI laws cover these services effective January 1, 1972, as a condition for Federal certification of the State law for tax credit (Public

Law 91-373). States were, however, permitted to exclude certain services from coverage, including the following services described in section 3309(b), FUTA, performed:

> "(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches;
>
> "(2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;
>
> "(3) in the employ of a school which is not an institution of higher education."

The 1976 amendments (Public Law 94-566) required, as a condition for tax credit, that States extend coverage, effective January 1, 1978, to most State and local government workers. Although retaining the limited exclusions under paragraphs (1) and (2) above, the Congress deleted the exclusion under paragraph (3) relating to elementary and secondary schools. The question posed was whether their exclusion is permitted pursuant to paragraph (1); paragraph (2) is not at issue.

Several different church groups challenged coverage of a variety of church-related elementary and secondary schools resulting from the repeal of the exemption contained in paragraph (3) basing their position on the alleged applicability of paragraph (1).

4. *Secretary's Decision.* Secretary Marshall's decision concerning unemployment insurance coverage of services performed for church-related schools was announced April 18, 1978, in a letter of that date to the Most Reverend Thomas C. Kelley, O.P., General Secretary, United

States Catholic Conference. Secretary Marshall advised that repeal by Congress of the exclusion in section 3309 (b) (3), FUTA, formerly exempting employees of a school which is not an institution of higher education, was clearly intended to result in State coverage of church-related elementary and secondary schools.

The only services performed in church-related elementary and secondary schools recognized as being within the scope of the exclusion permitted by section 3309(b) (1), FUTA, (and aside from the permitted (b) (2) exclusions) are those strictly church duties performed by church employees at the schools pursuant to their church responsibilities. The exclusion in section 3309(b) (1) (A) relating to church employees has no other application to activities performed in elementary and secondary schools since the schools are not churches within the meaning of that section. The exclusion contained in section 3309(b) (1) (B) applies only to services performed for organizations, other than educational institutions, that are church operated, supervised, controlled, or principally supported and whose employees are primarily engaged in religious activities. Subsection (b) (1) (B) does not apply to institutions where the employees of the institution are primarily engaged in educational activities at the elementary and secondary school level.

These conclusions, which are neutral as between schools operated by religious or secular organizations, give effect to the congressional purpose of extending unemployment insurance protection to virtually all employees. Thus, practically all of the estimated 242,000 employees of nonpublic elementary and secondary schools are covered; approximately 85 percent of the 242,000 are employees of church-related schools. Further, these conclusions are consistent with the well-established legal doctrine that exemptions from remedial statutes are to be narrowly con-

strued and their application limited to those establishments plainly and unmistakably within their terms and spirit.

If an employee performs both non-exempt and exempt services during a single employment period, as in the case of services performed for a church-related school and an organization exempted by section 3309(b)(1), and "if the services performed during one-half or more of any pay period by an employee for the person employing him constitute employment, all the services of such employees for such period shall be deemed to be employment, but if the services performed during more than one-half of any such pay period by an employee for the person employing him do not constitute employment, then none of the services of such employee for such period shall be deemed to be employment," as provided in section 3306(d), FUTA.

5. *Action Required.* All SESAs, except Kentucky for which coverage is deferred by Federal law until January 1, 1979, should inform all nonprofit elementary and secondary schools that services performed in their employ on and after January 1, 1978, are covered, with the limited exceptions specified above. All such employing units which are nonprofit institutions required to be covered should also be advised of their right to elect either the reimbursement or the contribution method of financing benefit costs. The election should be effective January 1, 1978.

If a State has enacted a transition provision authorized by seection 121 of P.L. 94-566, previously exempt services for such schools are usable to establish a claim for benefits similar to other previously exempt services. Benefits based upon wages paid for previously exempt

services may be noncharged as provided in ETA Handbook No. 364, issued September 2, 1977.

States that have held in abeyance or denied claims of employees of nonprofit schools should proceed to process or redetermine those claims. If claims have been established and monetarily determined without the use of wages earned in the employ of nonprofit schools, those claims should be redetermined. All SESA's should report within 30 days of the date of this letter to their respective Regional Offices of the actions they have taken or intend to take with respect to coverage of services in nonprofit schools below the level of institutions of higher education, and treatment of individuals whose claims were filed after December 31, 1977, and whose base period services consisted, in whole or in part, of services in such schools.

Those States which must take legislative or other action in order to implement the coverage requirements prescribed above should report to the Regional Office what actions they intend to take as well as inform them of the effective date of such actions.

6. *Inquiries.* Questions concerning this program letter should be directed to the appropriate Regional Office.

DECISION

MAR 29 1978

MEMORANDUM FOR THE SECRETARY

FROM: CARIN ANN CLAUSS
Solicitor of Labor

SUBJECT: Coverage Under the Federal-State Unemployment Program of Employees of Church-Related Non-Profit Elementary and Secondary Schools

Inquiry has been made of the Employment and Training Administration concerning coverage under the Federal-State Unemployment Compensation Program of employees of church-related non-profit elementary and secondary schools. The question posed is whether States, as a condition to continued participation in the Program, are required to cover employees of such schools under their unemployment compensation laws.

We conclude that as of January 1, 1978, States participating in the Program were required to extend coverage under their unemployment compensation law to employees of nonprofit schools and that employees of church-related non-profit elementary and secondary schools generally may not be excluded from coverage. Employees of nonprofit schools of higher education have been covered since 1970. Only church employees who bear some special relationship to the church and have some church-related responsibility within the school remain outside the scope of required coverage.

The relevant portions of the statutes being construed are Title III of the Social Security Act, as amended (41 U.S.C. 501 *et seq*) and the Federal Unemployment Tax Act (26 U.S.C. 3301 *et seq*). These provisions were amended by Public Law 94-566 (October 20, 1976)

which was an Act "to require States to extend unemployment compensation coverage to certain previously uncovered workers. . . ."

The inclusion of non-public elementary and secondary school employees was accomplished at the same time public elementary and secondary schools were covered by the further restriction of an exemption which prior to amendment read:

> This section shall not apply to service performed —
>
> (3) in the employ of a school which is not an institution of higher education.

P.L. 94-566 repealed subsection (3).

There remains in section 3309(b) subsections (1) and (2) which exempt service performed:

> (1) in the employ of
>
> (A) a church or convention or association of churches; and
>
> (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;
>
> (2) by a duly ordained, commissioned, or licensed minister of the church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order.

Prior to the 1976 amendments consideration of subsections (1) and (2) was not essential since elementary and secondary schools were specifically exempted under subsection (3) regardless of whether they were private, nonprofit or primarily religious schools in order to put them on an even footing with the noncoverage of public schools. With the loss of that exemption, Bishop Kelly and others

have now sought to bring parochial elementary and secondary schools within subsection (1). The alternative positions we have identified for responding to the question follow.

1. Section 3309(b)(1) is limited to church establishments and organizations which primarily engage in the religious activities associated with the exempt establishment.

When implementing the 1970 amendments ETA had considered that subsection (1)(B) did not apply to parochial schools since the only educational "organizations" publicly recognized as "primarily for religious purposes" were seminaries preparing students for the ministry or to become members of religious orders. In the case of subsection (1)(A) "church" was construed in the limited sense synonymous with "house of worship" as a distinct physical place thus narrowing the exclusion to those groups primarily concerned with religious and denominational matters of church government or groups representing church government. This view is consistent with the well-established legal principle normally applicable to exemptions from remedial statutes generally: ". . . these exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 391 (wage-hour); see *Better Business Bureau of Washington, D.C., Inc. v. U.S.*, 326 U.S. 279 (unemployment insurance).

ETA originally published the foregoing view, faithfully reported by the loose-leaf services, by proposing model legislation for the states to adopt in implementing the 1970 amendments covering institutions of higher learn-

ing. This position is favored by ETA, has "neutrality" to recommend it and clearly isolates all elementary and secondary schools as a single class under former subsection (3). It is consistent with the legislative history of bills introduced in the Sixties which, although not enacted, document the purpose of the 1970 amendments. Under this position the repeal of (3) results in covering virtually all of the 242,000 employees of nonpublic elementary and secondary schools Congress "intended" to cover (see S.Rep. No. 94-1265, 94th Cong. 2d sess. 8 [1976]) since Department of Labor statistics show that about 85% of the 242,000 are from church-related schools.

Vulnerability. The position does not attempt to directly deal with the phrase "in the employ of" prefacing the exclusions contained in (b)(1). However, there is abundant judicial authority under the Fair Labor Standards Act for dealing with the very similar problem of exemptions from the wage-hour law that could persuade a court to be controlled by remedial purposes of the legislation in the direction of universal coverage. The Supreme Court long ago acknowledged the common remedial purposes shared by the FLSA and unemployment insurance program (see footnote 1), and the prospects of applying a narrow construction rule should be considered to be favorable.

2. Section 3309(b)(1) should be construed to give effect to the phrase "in the employ of" a "church" or "organization" which is "primarily religious."

A somewhat lesser percentage of the 242,000 would be covered by an alternative position resulting from a complex series of ETA memorandums responding to an inquiry from Colorado. This later view is an attempt to

deal with section 3309(b)(1) on a literal basis and de-emphasizes the distinctly physical characterization of "church" as a "house of worship" or establishment. Instead it focuses upon the employment relationship.[1] Under this literal view all employees of the "church", as a legal entity, would be exempt under (1), and all employees of a separately incorporated elementary or secondary school would be covered by the repeal of (3) even though absolutely controlled by the exempt church and operated for religious purposes.

Vulnerability. While this position appears comfortable at first blush, it does offer the opportunity for numerous interpretative problems relating to employment, legal organization and interrelationship of "churches" and "schools" (e.g., episcopal, congregational, representative governmental structures) by placing a premium on legal employment and ignoring the educational activity as the basis for the former exemption. Thus a religious body organized along episcopal lines obtains a highly centralized authority over the affairs of local bodies and their activities, tending to merge the "church" and the "school" under a single umbrella. At least in those circumstances a nice question is presented as to whether any exemption should be determined merely by the form of business association a particular organization elects rather than on the basis of the activity performed, i.e., the operation of an elementary or secondary school.

---

[1] The courts have followed a common path in defining the employment relationship for coverage purposes under the Fair Labor Standards Act and the Social Security Act which FUTA incorporates. See *U.S. v. Silk,* 331 U.S. 704, 712 followed in *Rutherford Food Corp. v. McComb,* 331 U.S. 722, 724 (1947). Broadly construing "coverage" must be distinguished from narrowly construing "exemptions."

3. Section 3309(b)(1) exempts every church-related elementary or secondary school.

This position would give an expansion reading to "in the employ of . . . (A) a church . . . or (B) an organization which is operated primarily for religious purposes. . . ." This view would project some recent language employed by the Supreme Court in striking down state funds for certain auxiliary services to non-public sectarian elementary and secondary schools:

> The church-related elementary and secondary schools that are the primary beneficiaries of Act 195's instructional material and equipment loans typify such religion-pervasive institutions. The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. See *Lemon v. Kurtzman,* 403 U.S. at 616-617. Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole. "[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined." *Id,* at 657 (opinion of Brennan, J.). See generally Freund, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680, 1688-1689.
>
> For this reason, Act 195's direct aid to Pennsylvania's predominantly church-related, nonpublic elementary and secondary schools, even though ostensibly limited to wholly neutral, secular instructional material and equipment, inescapably results in the direct and substantial advancement of religious activity, cf. *Committee for Public Education & Religious Liberty v. Nyquist,* 413 U.S. at 781-783 and n. 35, and thus constitutes an impermissible establishment of religion. *Meek v. Pittenger,* 421 U.S. 349, 366 (1975).

Justice Stevens, concurring and dissenting in *Wolman v. Walter,* 37 S.Ct. 2593, 2614 (1977), quoted the language set out above while observing that a sectarian school's mission "at heart is religious" and "the sectarian school itself, not the legislation . . . is 'entangled' with religion." Thus, ". . . excessive entanglement of church and state would result from attempts to police use of material and equipment that were readily divertible to religious uses. . . ." *Meek, supra.* at footnote 16.

Vulnerability. While the Supreme Court has been very cautious in permitting any form of state aid to sectarian education a distinction between aid and remedial legislation to secure socio-economic benefits to employees can be drawn as the Solicitor General has done in the *Catholic Bishop of Chicago* brief, infra. The Supreme Court in that case will hopefully provide guidance as to how far the government can legitimately extend the socio-economic goals into a church-related school. Conversely it may indicate how narrow is the area of church activity that is protected by the First Amendment. These considerations should eventually help us in how best to construe section 3309(b)(1). It suggests that an interpretation of coverage of church-related schools could legitimately await an explicit Congressional mandate thereby avoiding any constitutional litigation with church-related schools until absolutely necessary. Whether a "public interest" group would sue the Department to force a coverage interpretation based upon an alleged "establishment of religion" violation resulting from an interpretation exemption sectarian schools generally is speculative, but not beyond the realm of possibility.

Perhaps the greatest significance is the fact that ETA has been informally indicating a coverage position to the state agencies since the enactment of the 1976 amendments fol-

lowing along the lines of option 1. A change to a "no coverage" position now would be a distinct change of direction that most likely will alienate state agencies most of whom have been supportive of coverage.

Recommendation

Obviously, if subsection (1) applied to church-related elementary and secondary schools prior to the 1976 amendments it continues to apply since the legislative history is silent. Option 1 would indicate that (1) did not apply. Option 2 would allow (1) to apply in some circumstances governed largely by chance organization of the church and its related school. Option 3 would apply (1) in all circumstances based upon the silent legislative history of the 1976 amendments and avoidance of possible constitutional involvement. The Employment and Training Legal Services Division favors option 1.

I, too, favor option 1, although I would be comfortable defending any of the three alternatives.

An abbreviated memorandum of law on the First Amendment is attached for your information and incorporates the arguments made by the Solicitor General in the *Catholic Bishop of Chicago v. NLRB* case now pending in the Supreme Court.

The letter prepared by ETA in response to the inquiry of Bishop Kelly is enclosed.

Enclosure

Memorandum of Law

SUBJECT: COVERAGE UNDER THE FEDERAL-STATE UNEMPLOYMENT COMPENSATION PROGRAM OF EMPLOYERS OF CHURCH-RELATED NON-PROFIT ELEMENTARY AND SECONDARY SCHOOLS

The relevant portions of the statutes being construed are Title III of the Social Security Act, as amended (42 U.S.C. 501 *et seq*) and the Federal Unemployment Tax Act (26 U.S.C. 3301 *et seq*).

I. *Question Presented.*

The question presented is whether Congress, in repealing the exclusion in Section 3309(b)(3) of FUTA, for employees of non-profit elementary and secondary schools, extended coverage to employees of church-related non-profit elementary and secondary schools, or whether the 3309(b)(1) exclusion for persons "in the employ" of a church or "an organization controlled or principally supported" by a church continued their exempt status. Any answer to this question necessarily raises First Amendment considerations. Given this context, an analysis of the statutes, their legislative history, and contemporaneous interpretation of the agency charged with administering these laws suggests that the (b)(1) exclusion for church-related institutions does not apply to employees of nonprofit elementary or secondary schools.

II. *Coverage of Employees of Church-Related Elementary and Secondary Schools is Constitutionally Permissible.*

A.

In November 1977, the Solicitor General summarized the First Amendment as interpreted by the Supreme

Court in a petition for review of the Seventh Circuit's decision in the *Catholic Bishop of Chicago* case:

> The First Amendment provision that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" embraces two concepts, "freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Cantwell v. Connecticut,* 314 U.S. 296, 303-304. It is therefore settled that the "freedom to act, even when the action is in accord with one's religious convictions", may be reasonably restricted by neutral legislation. *Braunfeld v. Brown,* 366 U.S. 599, 603. See *United States v. Reynolds,* 98 U.S. 145, 166. However, only those governmental "interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder,* 406 U.S. 205, 215. Accordingly, where it is claimed that regulation "interferes with the practice of a legitimate religious belief, it must appear either that the [government] does not deny the free exercise of religious belief by its requirement, or that there is a [governmental] interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." *Id* at 214. See also *Sherbert v. Verner,* 374 U.S. 398, 403.

Following the lines of the Solicitor General's argument leads to these conclusions:

1. The purpose of the Unemployment Compensation Program as amended is entirely secular since it is intended to protect the unemployed by the extension of benefits providing a measure of relief from the loss of income with which to purchase food, clothing and shelter. The substantial governmental interest in the general welfare of her citizens is not seriously open to dispute.

The contention that parochial school operations must be exempt from the requirements of general legislation merely because the institutions have a religious purpose has been rejected. Such schools are not immune from regulations such as fire inspections, zoning ordinances, health and safety standards, minimum wage laws, compulsory attendance requirements, or a number of other governmental restrictions that may have an unintended [neutral], incidental effect upon the schools' religious operations.

2. There has been no suggestion that coverage under the Unemployment Compensation Program would require church-related schools to take action inconsistent with their religious beliefs. Even so, the UI coverage is permissible by the compelling state interest.

B.

There are more than 10,000 parochial schools in the U.S. A number of these have acquiesced in coverage under the 1970 and 1976 amendments with no claim of abridgement of religious freedom. Nevertheless they remain free to raise the sort of issuee litigated by employers generally, and no reasons have been advanced as to why the normal processes of claim resolution cannot work smoothly. If a church official were to contend that an employee was in fact fired for espousing heretical views, the claims examiner would be limited to a determination whether the employer's alleged reason for the discharge was the actual one. Once it is determined that the employee had not been removed or disciplined in an effort to interfere with rights created by the UI program, the inquiry would be at an end. If the employee had been discharged because of the employer's belief that the employee was unquali-

fied to teach in a parochial school, the validity of that belief as a part of church doctrine would play no part in the decision. Concern by church officials that their decisions would be compromised by potential oversight in the claims process is speculative at best and, even if legitimate, would not support a blanket exemption from the Act which could be viewed as governmental action respecting the establishment of religion violative of the First Amendment.

NO. 80-120

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH and NORTHWESTERN LUTHERAN ACADEMY,

Petitioners,

v.

THE STATE OF SOUTH DAKOTA,

Respondents.

RESPONSE OF THE STATE OF SOUTH DAKOTA TO THE PETITION FOR A WRIT OF CERTIORARI FILED BY PETITIONERS ON JULY 25, 1980

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NO. 80-120

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v.

THE STATE OF SOUTH DAKOTA

Respondents.

RESPONSE OF THE STATE OF SOUTH DAKOTA TO THE PETITION FOR A WRIT OF CERTIORARI FILED BY PETITIONERS ON JULY 25, 1980

The Respondent believes that the Petitioner has fairly set forth in the Questions Presented for review a correct coverage of the questions addressed by the Supreme Court of the State of South Dakota, Opinion No. 12801, dated March 26, 1980.

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The references to the opinions of the South Dakota Supreme Court and those unreported below it are accurate. The Respondent believes that the correct statute that is involved in this lawsuit is 26 U.S.C. § 3309(b) and not 26 U.S.C. § 3309(a) as set forth by the Petitioner on page 7 of his Petition, as that is the section of the statute referred to by the South Dakota Supreme Court.

REASONS FOR DENYING THE PETITION

1. THERE WAS NO FEDERAL QUESTION OF SUBSTANCE DECIDED BY THE SOUTH DAKOTA SUPREME COURT NOT HERETOFORE DETERMINED BY THIS COURT.

The exact question of whether or not church schools should be subject to the payment of unemployment taxes on employees has not been resolved by this Court, as the issue has only recently arisen, but the determination of congressional intent as applied to acts of congress and to statutory construction of those acts, and the boundaries of the First Amendment of the United States Constitution have been set forth by this Court.

A. The South Dakota Supreme Court followed this Court's rulings in deferring to the contemporaneous construction of the federal statute given to the statute by the agency which was charged with its administration. *Udall v. Tallman*, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965); *Unemployment Commission v. Aragon*, 329 U.S. 143 (1946); *American Fed. of State, City, and Municipal Employees v. City of Cleveland*, 484 F.2d 338 (6th Cir. 1973).

B. The South Dakota Supreme Court followed this

Court's rulings in looking to congressional intent in passing laws.

Congress has followed an unbroken path toward expansion of unemployment insurance coverage since 1935. Starting in 1970, Congressional revisions and accompanying legislative reports show that Congress expected the "operated primarily for religious purposes" language in section 3309(b) to be narrowly construed, at least as applied to educational institutions. This history is set forth in the opinion written by the South Dakota Supreme Court. Since Congress has not attempted nor did it actually alter the direction that the Department of Labor has taken since 1970, nor did it take any action since 1978 on the Department's interpretation of section 3309(b) this creates a presumption in favor of the administrative interpretation, to which the court will give great weight, even if the court doubts the original correctness of the ruling of the Department. *Costanzo v. Tillinghast*, 287 U.S. 341, 53 S.Ct. 152, 77 L.Ed. 350 (1932). Therefore, the Supreme Court of South Dakota did not break any constitutional ground in looking to congressional intent, but followed the previous rulings of this Court as to how to apply the intent.

C. The South Dakota Supreme Court followed this Court's rulings in applying the boundaries of the First Amendment Rights.

The Petitioner has raised the question as to whether or not the State has become excessively entangled in the operations of the church. This case involves the question of whether the South Dakota Unemployment Compensation Act infringes the freedom of religion enjoyed by the Petitioner under the First Amendment in its operation of religious

schools. This Court has previously determined that the Petitioner had to demonstrate that the legislation had a coercive effect and that such legislation operated against the Petitioner in the practice of its religion. *Abington School District v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963).

This Court has ruled that while the First Amendment protection of religious belief is absolute, religiously-based conduct "remains subject to regulation for the protection of society." *Cantwell v. Connecticut*, 310 U.S. 296, 303-304, 60 S.Ct. 900, 903, 84 L.Ed. 1213, 1218 (1940). This Court has held that it is not excessive entanglement to require churches to observe child labor laws, *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), nor for them to follow the minimum wage requirements, *Mitchell v. Pilgrim Holiness Church Corp.*, 210 F.2d. 879 (7th Cir.), cert.den., 347 U.S. 1013 (1954), nor to prohibit polygamy, *Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244 (1878). This Court has not tolerated those programs that require constant surveillance or supervision of the state to police its provisions or that single out churches or church-related schools for preferential treatment. To apply the provisions of the Unemployment Act is not to require constant surveillance or supervision of the church supported school. To allow preferential treatment as the Petitioner requests in this case, exemption from taxes that all other schools pay, would be to establish a religious preference in violation of the First Amendment and the rulings of this Court. *Wolman v. Walter*, 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977); *Tilton v. Richardson*, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971); *Waltz v. Tax Commission*, 397 U.S. 664, 90 S.Ct. 1409, 25

L.Ed.2d 697 (1970); *Everson v. Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947).

To apply the unemployment tax does not in any way entangle the state with the church. There is no public investigator in every classroom as was noted in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), but a simple determination if the person claiming benefits was fired or quit.

The petitioner cites, *National Labor Relations Board v. Cathlic Bishop of Chicago*, 440 U.S. 490 (1979) for the authority that this Court has ruled on excessive entanglement between church and state. This Court declined to decide the First Amendment question in the absence of a clear expression of an affirmative intention of Congress to bring teachers and employees in church-related schools within NLRB jurisdiction. In this case Congress has shown its intention to have church schools pay unemployment taxes by its repeal of § 3309(b)(3). It can be seen that the South Dakota Supreme Court has followed all of the previous rulings of this Court and there was no federal question decided by them of substance which was not previously determined by this Court.

2. THE SOUTH DAKOTA SUPREME COURT DECIDED THE FEDERAL QUESTION THAT WAS IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

The Supreme Court of South Dakota followed this court's case law and the interpretation and application of the First Amendment rights under the United States Constitution and the Constitution of the State of South Dakota in reaching its decision. The Petitioners claim otherwise, but they seek from this Court an exemption from the laws that is not theirs to claim.

> The receiving of an exemption is thus a matter of legislative grace and not a constitutional right. As long as exemptions are denied by the Commissioner on a non-discriminatory basis using specific and reasonable guidelines and without inquiry into the merits of the particular religious doctrines, the withholding of religious exemptions is permissible under the Constitution. *Parker v. Commissioner of Internal Revenue*, 365 F.2d 792 (5th Cir. 1966), cert. den. 385 U.S. 1026 (1967).

In requiring the Petitioner to pay unemployment taxes on those they employ in their church-sponsored schools, the State of South Dakota is closely following the decisions of this Court which do not allow the establishment of religious preference. The reasoning of the South Dakota Supreme court and the cases it relied upon have been reproduced in the reported case of the South Dakota Supreme Court in Appendix A, A-1 through A-24, and need not be restated here.

CONCLUSION

THE QUESTION OF WIDESPREAD LITIGATION OF THIS ISSUE AS SET FORTH BY THE PETITIONERS IS CONCEDED.

The Respondents concede that this issue has provoked widespread litigation and that at this time only the State of South Dakota has taken the position of the Department of Labor. However, in this case the Supreme Court of South Dakota has faithfully followed the decisions of this Court in applying the law and the Constitution to the issues that were raised and therefore, respectfully request that the Petition for Certiorari be denied.

Respectfully submitted,

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No. 80-120

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH, *et al.*,
Petitioners

v.

STATE OF SOUTH DAKOTA

On Petition for a Writ of Certiorari to the Supreme Court of South Dakota

MOTION OF THE STATES OF ALABAMA AND NEVADA FOR LEAVE TO FILE MEMORANDUM AS AMICI CURIAE, AND MEMORANDUM OF THE STATES OF ALABAMA AND NEVADA AS AMICI CURIAE

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MOTION OF THE STATES OF ALABAMA AND NEVADA FOR LEAVE TO FILE MEMORANDUM AS AMICI CURIAE

Pursuant to Rule 29 of this Court's rules, the States of Alabama and Nevada hereby move the Court for leave to file out of time the attached amici curiae memorandum. As discussed below, the basis for this motion is that the attached memorandum is addressed solely to the issue raised by the Memorandum for the United States as Amicus Curiae, filed in this case on October 23, 1980.*

---

* It is the understanding of the States of Alabama and Nevada that the Memorandum of the United States as Amicus Curiae was accepted for filing after the deadline set forth in Rule 36 of this Court's rules.

The States of Alabama and Nevada were unaware of the existence of the United States' Memorandum until October 27, 1980, whereupon they immediately prepared the attached amici curiae memorandum.

As is discussed in the attached memorandum, the issue implicitly raised by the United States' Memorandum is whether the important questions of federal statutory and constitutional law raised by the Petition in the instant case should be resolved by this Court by review of the instant case or whether, instead, the Court should grant a writ of certiorari in another case raising the same issues on the basis of a clearer and more comprehensive record. The Memorandum for the United States neglects to mention that the United States' own petition for a writ of certiorari is due to be filed in this Court no later than December 8, 1980, to review the decision of the United States Court of Appeals for the Fifth Circuit in *States of Alabama and Nevada* v. *Marshall*, 626 F.2d 366 (1980). We submit that that case—which was based upon a stipulated record setting forth the relevant facts concerning the major churches in the two states and how those churches and their related schools would be affected by the statutory interpretation proposed by the Secretary of Labor—will present the Court a preferable vehicle upon which to decide the far-reaching questions raised in the instant case.

The States of Alabama and Nevada respectfully request this Court to allow them to file the attached amici curiae memorandum in order to clarify for the Court the questions raised by the Memorandum of the United States, and in order to assist the Court in selecting the appropriate vehicle for review of the important issues raised by the Secretary of Labor's interpretation of federal law.

Respectfully submitted,

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QUESTIONS PRESENTED

The States of Alabama and Nevada adopt the questions presented in the Memorandum for the United States as Amicus Curiae.

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---

MEMORANDUM OF THE STATES OF ALABAMA AND NEVADA AS AMICI CURIAE

INTEREST OF THE STATES OF ALABAMA AND NEVADA

On October 31, 1979, the United States Secretary of Labor decided to withhold certification from the States of Alabama and Nevada under the Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. §§ 3301-3310, on the basis that those states were not in compliance with FUTA for the 12-month period ending October 31, 1979, because they had failed to extend their unemployment compensation laws to employees performing services in church elementary and secondary schools. The States of Alabama and Nevada sought review of the Secretary of Labor's

ruling in the United States Court of Appeals for the Fifth Circuit, and, on September 8, 1980, that court set aside the Secretary of Labor's decision. *States of Alabama and Nevada* v. *Marshall*, 626 F.2d 366. A petition for a writ of certiorari in that case will be due in this Court on December 8, 1980. A final denial of certification under FUTA to the States of Alabama and Nevada would subject those States to the loss of millions of dollars of federal grants for administration of their unemployment compensation laws and public employment offices and would subject private employers in those States to the loss of hundreds of millions of dollars of credits against the Federal Unemployment Tax. *See* 26 U.S.C. § 3302; 29 U.S.C. §§ 49-49k; 42 U.S.C. §§ 501-504.

The decision of the Supreme Court of South Dakota in this case raises precisely the same issues presented by the proceedings brought by the Secretary of Labor to deny certification to the States of Alabama and Nevada under FUTA. Because of the serious impact that a denial of certification under FUTA would have upon the States, upon participants in the States' unemployment programs, and upon private employers in the States, the States of Alabama and Nevada[1] have a substantial interest in resolution of the issues raised by the decision of the Supreme Court of South Dakota.

SUMMARY OF ARGUMENT

The States of Alabama and Nevada request this Court to defer consideration of the Petition for a Writ of Certiorari to the Supreme Court of the State of South Dakota until December 8, 1980, when a petition for a writ of certiorari in the case of *States of Alabama and Nevada* v. *Marshall*, 626 F.2d 366 (5th Cir. 1980), will be due.

---

[1] This memorandum is filed by the States of Alabama and Nevada as Amici Curiae pursuant to Rule 36.4 of the rules of this Court.

The latter case presents a significantly better vehicle for review by this Court of the broad national issues presented by the decision of the Secretary of Labor that FUTA requires the extension of state unemployment compensation laws to church elementary and secondary schools. Alabama and Nevada thus urge the Court to await the filing by the United States of a petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit before determining whether to grant or deny the Petition in this case.

ARGUMENT

The Secretary of Labor instituted administrative proceedings to withhold certification from the States of Alabama and Nevada in 1979 due to the States' failure to extend their unemployment compensation laws to church elementary and secondary schools. Alabama and Nevada have contended that the Secretary's interpretation of section 3309(b)(1) of FUTA to require such coverage is erroneous and that the extension of unemployment laws to church elementary and secondary schools would violate the Religion Clauses of the First Amendment.

A hearing was held in the 1979 certification proceedings before an Administrative Law Judge of the Department of Labor. The record consisted primarily of extensive stipulations of fact agreed to by the Department of Labor and the unemployment agencies of the States of Alabama and Nevada. The Administrative Law Judge recommended certification of the States of Alabama and Nevada, but the Secretary of Labor rejected the recommendation. Alabama and Nevada sought review of the Secretary's decision in the United States Court of Appeals for the Fifth Circuit, and, on September 8, 1980, the court of appeals held that the Secretary of Labor's interpretation of section 3309(b)(1) of FUTA was erroneous. *States of Alabama and Nevada* v. *Marshall*, *supra*, 626 F.2d at 369.

The case from the Supreme Court of South Dakota did not arise under the procedures set forth in FUTA for determining whether states should be certified as in compliance with FUTA's provisions. The South Dakota case originated in the state unemployment agency when two Lutheran church schools administratively appealed the state agency's decision to comply with the Secretary of Labor's directive that states must extend their unemployment compensation laws to church elementary and secondary schools. The United States Secretary of Labor was not a participant in the South Dakota case. Although the decision of the Supreme Court of South Dakota interprets FUTA, the issue in the case, as recognized by the United States in its memorandum as amicus curiae, p. 6, actually involved the construction of the South Dakota unemployment compensation law.

The case decided by the United States Court of Appeals for the Fifth Circuit provides a significantly more suitable basis for resolution by this Court of the serious statutory and constitutional questions presented by the Secretary of Labor's interpretation of FUTA to require states to extend their unemployment compensation laws to church elementary and secondary schools. The resolution of these issues will affect the obligations of all 50 states in the Nation and every major church group as well. Because the questions to be decided depend upon the proper interpretation of section 3309(b)(1) of FUTA, it is appropriate to rule upon those questions in a case in which the federal statute itself, as opposed to a similar state statute, is actually at issue. It is also appropriate to rule on these important questions in a case in which the Secretary of Labor has issued a formal decision explaining the basis for his interpretation of FUTA. Moreover, because the United States, through the Secretary of Labor, was a party to the administrative proceedings involving Alabama and Nevada, it would participate directly as a party in proceedings before this Court upon a petition for

a writ of certiorari from the Fifth Circuit, rather than as an amicus curiae in proceedings upon the Petition in the instant case.

In addition to the above considerations, the broad record developed in the administrative proceedings leading to the decision of the Fifth Circuit provides a better basis for a ruling by this Court on the statutory and constitutional questions presented by the Secretary of Labor's interpretation of FUTA. The extensive stipulations of fact entered into between the parties in that case describe the operations and organization of the elementary and secondary school systems of several major church groups.[2] The South Dakota case, on the contrary, involves only two schools of one denomination. The stipulated record in the case from the Fifth Circuit also demonstrates the effect that extension of state unemployment compensation laws to church elementary and secondary schools would have on the operation of such schools.

Finally, deferral of a ruling on the Petition for a Writ of Certiorari to the Supreme Court of South Dakota until December 8, 1980, when a petition for a writ of certiorari is due in the case from the Fifth Circuit, will not significantly delay the Court's consideration of the issues raised by the Secretary of Labor's interpretation of FUTA.[3]

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[2] The church groups covered by the stipulations are the Roman Catholic, Lutheran and Baptist denominations.

[3] The States of Alabama and Nevada will be prepared to file their response supporting the grant of a petition for a writ of certiorari in *States of Alabama and Nevada* v. *Marshall, supra,* immediately after the petition is filed. The Court would thus be in a position to consider and rule upon both petitions before early January, 1981. Under Rule 35 of this Court's rules, petitioners' brief would be due by mid-February, and the brief of respondent would be due by mid-March. The case could thus be calendared for argument before the end of this term.

CONCLUSION

The Court should defer a ruling on the Petition for a Writ of Certiorari in the instant case until December 8, 1980, when a petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is due in *States of Alabama and Nevada* v. *Marshall, supra.*

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Motion of the States of Alabama and Nevada for Leave to File Memorandum as Amici Curiae, and Memorandum of the States of Alabama and Nevada as Amici Curiae were served by mail, postage prepaid, this 29th day of October, 1980, on Edward Thomas Schilling, Esq., 757 North Broadway, Suite 500, Milwaukee, Wisconsin 53202, counsel for petitioners; Judith A. Atkinson, Esq., Assistant Attorney General, Office of Attorney General, State Capitol, Pierre, South Dakota 57501, counsel for respondents; and by hand on F. James Foley, Attorney, Department of Justice, Washington, D.C. 20530, counsel for the United States as amicus curiae.

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No. 80-120

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In the Supreme Court of the United States

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ST. MARTIN EVANGELICAL LUTHERAN CHURCH AND NORTHWESTERN LUTHERAN ACADEMY, PETITIONERS

v.

STATE OF SOUTH DAKOTA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

QUESTIONS PRESENTED

1. Whether the Federal Unemployment Tax Act requires participating state unemployment compensation programs to cover employees of parochial elementary and secondary schools.

2. Whether coverage of employees of parochial elementary and secondary schools in an unemployment compensation program violates the First Amendment.

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INTEREST OF THE UNITED STATES

The Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. 3301 *et seq.*, and related federal laws authorize grants of federal funds to qualifying states for the administration of state unemployment compensation and employment service programs and provide federal tax credits for employers operating within such states. A state qualifies for these benefits within a given taxable year only if the Secretary of Labor certifies on October 31 of that year that the state's unemployment compensation program conforms to the requirements of FUTA. 26 U.S.C. 3304(c).

The decision of the Supreme Court of South Dakota in this case holds that FUTA requires the states, as a condition of certification, to include parochial elementary and secondary schools within the coverage of their unemployment compensation programs. This interpretation accords with that of the Secretary of Labor. Other courts, however, have ruled that FUTA does not require the coverage of such schools and that the statutes of certain states do not cover them. Because of the Secretary's responsibility under the statute to make annual certification decisions, the United States has a strong interest in obtaining a definitive interpretation of the requirements of FUTA.

STATEMENT

Petitioners are members of the Wisconsin Evangelical Lutheran Synod, which operates state-certified parochial schools within the State of South Dakota. Petitioner St. Martin Evangelical Lutheran Church operates an elementary school offering instruction to pupils from kindergarten through the eighth grade (Pet. App. A-38). Petitioner Northwestern Lutheran Academy is a secondary school providing instruction in grades nine

through twelve (*id.* at A-39). The Academy is designed to provide education to persons who intend to enter the Synod's preaching and teaching ministries as well as to provide a general Christian secondary education to students. Approximately 50% of the students who enter the Academy do not plan to become teachers or pastors (*id.* at A-40).

The issue in this case concerns the proper interpretation of the Federal Unemployment Tax Act (FUTA), 26 U.S.C. 3301 *et seq.*, and its implementation through the South Dakota Unemployment Insurance Law, Title 61 of the South Dakota Codified Laws Ann. (1978). These laws are part of the federal-state unemployment compensation system. Under this system, the United States provides grants to state employment agencies and tax credits to employers in states that have adopted unemployment compensation laws that conform to federal standards set forth in FUTA. See also 29 U.S.C. 49d; 42 U.S.C. 501. All 50 states participate in this system. A state is eligible for these benefits only if the Secretary of Labor certifies on October 31 of each year that the state's program conforms with the requirements of FUTA. 26 U.S.C. 3304(c).

Prior to 1976, FUTA permitted qualifying states to exempt from their programs certain types of employment by non-profit institutions, including services performed:

> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;
>
> (2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or

by a member of a religious order in the exercise of duties required by such order;

(3) in the employ of a school which is not an institution of higher education.

26 U.S.C. (1970 ed.) 3309(b). The South Dakota unemployment compensation law contained the same exemptions in almost identical language. In 1976, Congress amended FUTA and repealed the third exemption relating to elementary and secondary schools. Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, Section 115, 90 Stat., 2670. Thereafter, South Dakota amended its own statute to eliminate the third exemption relating to elementary and secondary schools beginning January 1, 1978, the effective date of the 1976 FUTA amendments. See S.D. Codified Laws Ann. § 61-1-10.4(3) (1978).

The Secretary of Labor has determined that the 1976 amendments to FUTA require that the statutes of qualifying states co er parochial school employees. This determination was communicated in a letter to the Most Reverend Thomas C. Kelley, General Secretary of the United States Catholic Conference (Pet. App. A-4). In May 1978, the South Dakota Department of Labor notified petitioners that the services provided in their schools constituted covered employment subject to the South Dakota Unemployment Insurance Law and therefore that their employees were covered under the state unemployment compensation program. Petitioners took an administrative appeal of this determination and a hearing was held before an Appeals Referee for the South Dakota Department of Labor. The referee ruled that the schools were subject to coverage under the statute, but ruled that pastors and male teachers were exempt from coverage under the second exemption for ministers of a church (*id.* at A-35 to A-45). See S.D. Codified Laws Ann. § 61-1-10.4(2) (1978); 26 U.S.C. 3309(b)(2).

Petitioners sought review of the referee's decision in the South Dakota Circuit Court for the Sixth Judicial Circuit. The circuit court reversed the referee's decision and held that the schools were exempt under the first exemption of the statute (Pet. App. A-25 to A-34). The State appealed, and the South Dakota Supreme Court reversed and remanded with instructions to reinstate the referee's decision (*id.* at A-1 to A-24). The court examined the legislative history of FUTA and concluded that Congress intended to remove the exemption of parochial school employees when it amended the statute in 1976 (*id.* at A-5 to A-9). Accordingly, it held that petitioners' school employees were subject to unemployment coverage. The court further held that the statute, as thus construed, does not violate the First Amendment, noting that it does not conflict with any element of petitioners' religious beliefs and practices and does not foster excessive entanglement between church and state (*id.* at A-9 to A-16).

DISCUSSION

The United States believes that the Supreme Court of South Dakota correctly interpreted FUTA to require that parochial school employees be covered by the unemployment compensation laws of qualifying states. The United States also believes that the court below was correct in upholding the constitutionality of this coverage. However, because of the importance of the questions presented in this case and because of the conflict in interpreting FUTA between the Supreme Court of South Dakota and decisions of the United States Court of Appeals for the Fifth Circuit and the Supreme Court of North Dakota, we submit that the decision below warrants review by this Court.

In *Grace Lutheran Church* v. *North Dakota Employment Security Bureau*, Civ. No. 9719 (June 20, 1980) (Pet. App. A-46 to A-61), the North Dakota Supreme Court held that Section 3309 of FUTA and its "mirror image" (*id.* at A-49) in the North Dakota statute continue to exempt parochial schools from their coverage despite the deletion of the third exemption pursuant to the 1976 amendments. In *States of Alabama and Nevada* v. *Marshall*, 626 F. 2d 366 (1980) (Pet. Supp. App. A-1 to A-6), the Fifth Circuit recently was presented with an appeal from a decision by the Secretary of Labor to deny certification to the States of Alabama and Nevada as a result of the determination by those states that parochial schools were exempt from coverage under their unemployment compensation statutes. The court of appeals held that FUTA continues to exempt parochial schools and set aside the Secretary's decision.

It is important that this conflict over the interpretation of FUTA be resolved expeditiously. The entitlement of thousands of parochial school employees to unemployment compensation, which this Court has noted may be necessary to maintain a newly unemployed worker at subsistence levels (*California Dep't of Human Resources Development* v. *Java*, 402 U.S. 121, 131-132 (1971)), turns upon the proper construction of the statute.[1] The present controversy, however, has broader ramifications that transcend this particular group of employees. FUTA is the heart of the entire federal-state unemployment compensation system. One of the essential

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[1]The Secretary has administrative proceedings pending against eight other states, in addition to Alabama and Nevada, for failure to conform their unemployment compensation programs to the Secretary's interpretation of the federal statute.

elements of that system is uniform application of federal law from state to state, as embodied in the certification of state systems by the Secretary. With the present uncertainty in the proper application of FUTA, conformity determinations by the Secretary, with their attendant consequences for grants to state agencies and tax credits to employers, may vary from state to state depending upon the judicial interpretation of FUTA in effect in a particular state. Thus, the continuing litigation and conflicting results concerning FUTA's coverage pose a serious hindrance to the effective and uniform administration of the nation's unemployment system that can be resolved only by a definitive interpretation of FUTA.

Although this case technically involves the construction of a South Dakota statute, it provides an appropriate vehicle for resolution of the FUTA controversy. The South Dakota Supreme Court made clear in its opinion that it interpreted the state statute as being intended to treat parochial schools in the same manner as did FUTA.[2] Thus, the case involves no independent question of state law; rather, as the court below stated, the statutory question here is the "congressional intent with respect to the repeal of Section 3309(b)(3) of FUTA" (Pet. App. A-5). This case, therefore, squarely presents to this Court the question of the proper interpretation of FUTA, the federal statute. See *United Air Lines* v. *Mahin*, 410 U.S. 623, 630-631 (1973); *State Tax Comm'n* v. *Van Cott*, 306 U.S. 511, 514-515 (1939).

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[2] This general intent is apparent from provisions of the state statute that tie its coverage to FUTA. See S.D. Codified Laws Ann. §§ 61-1-7, 61-1-18.1 (1978).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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THE STATE OF SOUTH DAKOTA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

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v.

THE STATE OF SOUTH DAKOTA,

Respondent.

BRIEF FOR THE PETITIONERS

QUESTIONS PRESENTED

I. Whether church elementary and secondary schools are exempt from coverage under the Federal Unemployment Tax Act, as adopted by the State of South Dakota?

II. Whether there is a significant risk that a First Amendment right will be infringed so that there must be a clear expression of affirmative intent by Congress to include church elementary and

secondary schools within the Federal Unemployment Tax Act, as adopted by the State of South Dakota?

III. Whether application of the Federal Unemployment tax Act as adopted by the State of South Dakota to church elementary and secondary schools, violates the Establishment and Free Exercise Clauses of the First Amendment to the Constitution of the United States?

PARTIES TO THE PROCEEDING

All parties to the proceedings from the Supreme Court of South Dakota are included in the caption of the case before this Court. The United States is not a party to the case but has indicated its interest by filing a memorandum to the Petition as amicus curiae. The States of Alabama and Nevada also are not parties to the case but have indicated their interest by filing its Memorandum to the Petition as amici curiae.

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OPINIONS BELOW

The opinion of the South Dakota Supreme Court, reported at 290 N.W.2d 845 (S.D. 1980), appears in the appendix to the petition for the writ (Pet. App. A1-A24). The opinion of the Circuit Court, Sixth Judicial Circuit of South Dakota, not reported, appears in the appendix to the petition for the writ (Pet. App. A25-A34). The opinion of the Appeals Referee for the South Dakota Department of Labor — Unemployment Insurance Division, not reported, also appears in the appendix to the Petition for the Writ (Pet. App. A35-A45).

JURISDICTION

The judgment of the Supreme Court of South Dakota was entered on March 26, 1980. A timely petition for rehearing was denied on May 2, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3) (1970).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment, provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

The relevant provisions of 26 U.S.C. §3309(b) (1970), as it existed prior to the Unemployment Compensation Amendment Act of 1976, Pub.L.No. 94-566, §115, 90 Stat. 2670, which in effect, repealed Sec. 3309(a)(3) (1970), are as follows:

> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization

which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches.

(2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order.

(3) in the employ of a school which is not an institution of higher education.

The relevant provisions of the South Dakota statutes, S.D. Compiled Laws Ann. §61-1-10.4, adopted to conform to federal law, as it existed prior to January 1, 1978 (before repeal of S.D. Compiled Laws Ann. §61-1-10.4 (3) are as follows:

(1) In the employ of

(a) a church or convention or association of churches, or

(b) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches; or

(2) By a duly ordained, commissioned or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or

(3) In the employ of a school other than a state school which is not an institution of higher education; or

. . . .

STATEMENT OF THE CASE

A. Brief Statement of The Facts and The Proceedings Below

Northwestern Lutheran Academy is a four year preparatory school for entrance at Northwestern College or Dr. Martin Luther College in preparation for the preaching or teaching ministry (Pet. App. A39).

St. Martin Evangelical Lutheran Church is a Lutheran church that operates a parochial elementary school (Pet. App. A38).

Northwestern Lutheran Academy, which is not separately incorporated, but is owned and operated by the Wisconsin Evangelical Lutheran Synod, and St. Martin Evangelical Lutheran Church, which is separately incorporated as a church under South Dakota law, are both members of and part of the Wisconsin Evangelical Lutheran Synod (Pet. App. A36).

The Wisconsin Evangelical Lutheran Synod currently has 1105 member congregations in 47 states and three provinces of Canada (Pet. App. A36). Many of its member churches maintain elementary Christian day schools like the school maintained by St. Martin Evangelical Lutheran Church. In addition to area Lutheran high schools, which are maintained by associations of member churches, the Synod maintains four academies, of which Northwestern Lutheran Academy is one, two colleges and one theological seminary (Pet. App. A36).

Further appropriate facts are in the Findings of Facts found in the Administrative Decision by the hearing officer for the South Dakota Department of Labor (Pet. App. A36-A40).

Prior to January 1, 1978, the Federal Unemployment Tax Act (26 U.S.C. §3301 et seq.) permitted states to exempt certain services from taxation, which were codified in South Dakota in S.D. Compiled Laws Ann. §61-1-10.4.

In 1976, the Federal Unemployment Tax Act was amended by Pub.L.No. 94-566, §15, 94 Stat. 2670, "The Unemployment Compensation Amendment Act of 1976," and as required by Congress, the South Dakota legislature, among other things, in effect repealed the elementary and secondary school exclusion contained in subsection (3) of S.D. Compiled Laws Ann. §61-1-10.4.

Thereafter, in December of 1976 and February of 1977, the U.S. Department of Labor issued two interpretive memoranda to state labor agencies explaining the repeal of 26 U.S.C. §3309(b)(3). These memoranda stated that the exemptions of 26 U.S.C. §3309(b)(1) and (2) would continue to apply to church schools. (J.A. 34; J.A. 36)

Then, in April 1978, the U.S. Secretary of Labor announced in a letter to the Most Reverend Thomas C. Kelly, General Secretary of the U.S. Catholic Conference, that the repeal by Congress of the primary and secondary school exclusions intended to result in unemployment compensation coverage of church related schools. Memoranda of this interpretation by the U.S. Secretary of Labor were given to the States (J.A. 40). The South Dakota Department of Labor then issued a determination that Northwestern Lutheran Academy and the school which is a part of St. Martin Evangelical Lutheran Church were subject to coverage under unemployment insurance law.

This determination was appealed by the church and the Wisconsin Synod to an Appeals Referee of the South Dakota Department of Labor. The Administrative decision (Pet. App. A44) held that Northwestern Lutheran Academy and St. Martin Evangelical Lutheran Church were not exempt from the unemployment compensation law, that male teachers were ministers exempt from coverage, but that female teachers were not ministers nor members of a religious order and therfore subject to coverage. The Appeals Referee further stated that because of the directive from the U.S. Department of Labor mandating coverage of church schools the Church's constitutional argument could not be accepted.

Northwestern Luthern Academy and St. Martin's Evangelical Lutheran Church appealed to the Circuit Court. The court concluded in its Memorandum Decision dated March 19, 1979, that the operation of these church schools was primarily for a religious purpose, and that they were exempt under the Act from coverage. The court did not find it necessary to address the constitutional issues raised nor whether female teaching ministers were exempt from coverage. (Pet. App. A33)

The State of South Dakota appealed from the judgment of the Circuit Court to the South Dakota Supreme Court of South Dakota which reversed the Circuit Court (Pet. App. A1). The South Dakota Supreme Court held that Congress "apparently" intended to include elementary and secondary church schools within the unemployment compensation law when it repealed the elementary and secondary school exemption in 26 U.S.C. §3309(b)(3); that coverage of elementary and secondary church schools does not infringe on the freedom of religion guaranteed by the First Amendment to the Constitution; that

coverage would not foster excessive entanglement even though "inclusion . . . will necessarily call for increased involvement between the state and the schools . . ."; and, that female teachers are not exempt from coverage as members of religious orders or as ministers because "they are allowed to perform only those functions normally associated with basic eduaction."

B. General Outline of Statutory History

The Federal Unemployment Tax Act, 26 U.S.C. §3301-3311, referred to herein as FUTA, had its origins in the Social Security Act of 1935, Pub.L.No. 221, 49 Stat. 620 (1935) (codified at 42 U.S.C. §301-1397f). It creates a comprehensive, complex federal-state unemployment compensation program, the history of which has been one of steadily increasing coverage, not only with respect to the types and number of employees covered, but also in terms of the amount of tax involved and benefits paid. FUTA imposes a federal tax on "for profit" employers with incentives to states who adopt federally approved programs. These incentives are credits to employers against the federal tax for amounts paid into a state unemployment fund and direct grants to the state for the administration of its unemployment compensation program. *See* 26 U.S.C. §3302(a), (b); 29 U.S.C. §49(d) (1976); 42 U.S.C. §501 (1976). To receive these incentives the Secretary of Labor must certify that the provisions required by FUTA are contained in the state's laws and that the state has substantially complied with those laws during the annual certification period. 26 U.S.C. §3304(c). Accordingly, all states including South Dakota have enacted so called "mirror images" of the required FUTA provisions. For a discus-

sion of the history and operation of FUTA see Comment, *Bringing Christian Schools Within the Scope of the Unemployment Compensation Laws: Statutory and Free Exercise Issues,* 25 Vill. L. Rev. 69, 72-76.

Prior to 1970, all services performed for nonprofit organizations were not required to be included within the state's unemployment compensation program. In 1970 FUTA was amended by the addition of section 3309, requiring state coverage of nonprofit organizations but specifically exempting under section 3309(b)(1)(2) and (3) services performed:

> (1) In the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches;
>
> (2) by a duly ordained, commissioned or licensed minister of a church in the exercise of his ministry, or by a member of a religious order in the exercise of duties required by such order;
>
> (3) in the employ of a school which is not an institution of higher education.

Congress, by the Unemployment Compensation Amendments of 1976, Pub. L. N. 944-566, §115, 90 Stat. 2670, deleted the elementary and secondary school exemption contained in section 3309(b)(3), and, as required, South Dakota repealed subsection (3) of its mirror image statute. Congress retained the church exclusion contained in section 3309(b)(1).

Shortly after the deletion of the exemption in section 3309(b)(3) the Department of Labor, in a December 7, 1976 memorandum to all state unemployment agencies,

advised that the deletion of the exemption in section 3309 (b) (3) "does not affect the optional exclusion in 3309 (b) (1)" for church related schools. (J.A. 34)

Thereafter, on February 2, 1977, the Department of Labor in another memorandum to state agencies reconfirmed that, "[t]he changes made in section 3309 by P.L. 94-566 do not change the application of the exclusions in section 3309(b) (1) (A) and (B)." (J.A. 36) In this February, 1977 memorandum to the states the Department of Labor made it clear that the criteria for determining exemption for religious organizations is simply to determine "whether the workers in question are employed by a church . . ." and that this determination could be made "only after a thorough analysis of the legal interests and relationships between the organization and the church." (J.A. 39)

More than a year later on March 29, 1978, the Solicitor of Labor in a Memorandum to the Secretary, discussed the applicability of the exemption in section 3309 (b) (1) to church elementary and secondary schools. (J.A. 40). The Solicitor, after describing three possible interpretations of section 3309(b) (1) as it relates to church schools, stated that she would be "comfortable defending" any of the three positions (J.A. 52). Noting that the Department of Labor's Employment and Training Administration had been "informally indicating a coverage position to the state agencies" (J.A. 51) the Solicitor, recognizing "possible constitutional involvement," concluded that she favored a "coverage" position because "[a] change to a 'no coverage' position now . . . most likely will alienate state agencies most of whom have been supportive of coverage." (J.A. 50)

Thereafter, on May 30, 1978, the Department of Labor reversed itself and directed all state agencies to inform church related elementary and secondary schools of their coverage under unemployment compensation law and that the only services exempt from coverage under section 3309(b)(1)(A) are "those strictly church duties performed by church employees at the schools pursuant to their church responsibilities" (J.A. 42) and that section 3309(b)(1)(B) had no applicability whatsoever to church elementary and secondary schools. (J.A. 42)

SUMMARY OF ARGUMENT

When FUTA was amended in 1976 to require the states to repeal the elementary and secondary school exclusion as of January 1, 1978, the exemptions from unemployment compensation law available to church elementary and secondary schools under Sections 3309 (b)(1)(A) and (B) of FUTA were not affected. Because the actual employer is the church the exemptions belong to the church as an entity. Yet the South Dakota Supreme Court ignores the plain and unambiguous language in interpreting the state mirror image of the federal statute and says that the threshold question on the appeal involves a determination of congressional intent with respect to repeal of the elementary and secondary school exclusion attempting to find support in legislative history where none exists.

The South Dakota Supreme Court ignores well established case law authority that statutes should be construed to avoid constitutional conflicts, and further ignores the rule established in *NLRB v. Catholic Bishop,* 440 U.S. 490 (1979), that, as here, there is a significant risk that First Amendment rights under the Religion Clauses

might be infringed there must be a clear expression of affirmative intent by Congress to require states to include church elementary and secondary schools within their unemployment compensation laws.

If the court determines that the South Dakota Supreme Court correctly interpreted the law to require coverage of church elementary and secondary schools, such coverage would violate both the Religion Clauses of the First Amendment requiring that the decision by the South Dakota Supreme Court be set aside.

ARGUMENT

I. THE SOUTH DAKOTA SUPREME COURT INCORRECTLY INTERPRETED SECTION 3309 OF FUTA IN DENYING CHURCH ELEMENTARY AND SECONDARY SCHOOLS EXEMPTION FROM THE UNEMPLOYMENT COMPENSATION LAW.

Section 3309(b)(1) of FUTA provides an exemption for services performed in the employ of:

> (A) ". . . a church or convention or association of churches"; or
>
> (B) ". . . an organization which is operated primarily for religious purposes . . ."

The proper analysis in determining whether the particular services are exempt was set forth in a memorandum from the U.S. Department of Labor to all states dated February 2, 1977:

> Thus, under Section 3309(b)(1), FUTA, it must first be determined whether the workers in question are employed by a church or by an organization other than the church. If the workers are employed

> by a church, their services are excluded. Whether the church is the employer is primarily a question of fact. If, however, the workers are not employed by the church, it must then be determined whether the organization is operated primarily for religious purposes. (J.A. 39)

Under this analysis church elementary and secondary schools are exempt because they fall within the word "church" or, because they are operated primarily for religious purposes.

A. The Relevant Issue is Construction of the Exemption for Services in the Employ of a Church and not Congressional Intent

It is an elementary principle of statutory construction that when the words of a statute are clear the plain language of the statute is controlling. *See TVA v. Hill,* 437 U.S. 153, 173, 184 n.29 (1978); *Ex Parte Collett,* 337 U.S. 55, 61 (1949); *Caminetti v. United States,* 242 U.S. 470, 485 (1917)

Laws should mean what they express when they are worded in plain and unambiguous terms, and where there is no ambiguity, there is no room for construction. *United States v. Lexintgon Mill and Elevator Company,* 232 U.S. 399, 409-410 (1914); *Yates v. United States,* 354 U.S. 298, 305 (1957). In addition it is a well established rule of statutory construction that a meaning will be inferred to preserve its constitutional validity. *Ex Parte Mitsuye Endo,* 323 U.S. 283, 299 (1944)

Yet contrary to this well-accepted principle the South Dakota Supreme Court begins its decision by stating that the threshold question before it involved "congressional intent with respect to repeal of section 3309(b)(3) of FUTA (which resulted in the effective repeal of SDCL 61-1-10.4(3)." (Pet. App. A5)

B. Services Performed in Church Elementary and Secondary Schools are Exempt Because They are Services in the Employ of a Church

The South Dakota Supreme Court majority does not discuss the exclusion for services in the employ of a church or convention or association of churches provided for in 26 U.S.C. §3309(b)(1)(A) or the South Dakota mirror statute, S.D. Compiled Laws Ann. §61-1-10.4 (1)(a).

The critical interpretation to be made is what the statutory language, "service performed . . . in the employ of . . . a church . . ." means. The starting point in every case involving construction of a statute should be the language itself. *Southeastern Community College v. Davis,* 442 U.S. 397, 405 (1979) Does the word "church" refer to a body of believers or is it limited to be synonymous with an individual house of worship maintained by a particular congregation as the Appeals Referee for the South Dakota Department of Labor says it has been interpreted to the states to mean? (Pet. App. A43)

We submit that within the context of the quoted statutory language a "church" must be deemed to be an organization or entity and not a church building or structure.

Common usage of the term "church" refers to a body or organization of religious believers. (Webster's New Collegiate Dictionary, American Heritage Dictionary, and Black's Law Dictionary) This definition of church was said to include schools by the Federal District Court in *McCormick v. Hirsch,* 460 F.Supp. 1337, 1353 (1978) where the court said "the Supreme Court's definition of the schools is that it is the church itself."

If the term "church" in isolation is ambiguous, which we submit it is not, the context of the statute absolutely forecloses equation with a physical building. Both FUTA and the applicable South Dakota law support the premise that the word church has to be defined as an organization or entity and not as a structure.

26 U.S.C. §3306(a)(1) defines the word "employer" to include "any person who . . . paid wages . . ." The wages come from a body of believers not a building.

26 U.S.C. §3306(i), §3121(d)(2) defines "employee" as "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee." Pertinent regulations provide that an employer-employee relationship exists when facts show that the employer has the right to control the manner in which services are performed, has the right to discharge the person performing the services, and furnishes the place to work. *See* 26 C.F.R. §31.3121(d)-1(c)(2) (1979)

S.D. Compiled Laws Ann. §61-1-3 defines for purposes of the unemployment compensation tax an "employing unit as "any individual or type of *organization* . . . which . . . has . . . had in its employ one or more individuals performing services for it . . ." (Emphasis supplied). S.D. Compiled Laws Ann. §61-1-4.(1) defines "employer" as "any employment unit . . ."

Considering the context in which "church" appears in the statutes it is untenable to argue that the term could mean a physical building. Interpreting the word "church" to apply only to a building would make the statute absurd and ineffectual in every circumstance.

One need look no further than the language of the permissible exemptions contained in present sections

3309(b)(3), (4) and (5) of FUTA to demonstrate that Congress did not intend "church" to be limited to types of duties, programs or activities rather than the organization or entity itself.

If there remains any ambiguity in the meaning of "church," the legislative history of the term clearly demonstrates that it refers to a body of worshipers.

FUTA is a tax act, both as administered by the federal government and the states. It is a part of the Internal Revenue Code and should be interpreted to conform with other sections of the Internal Revenue Code. The term "church" has been consistently interpreted to include, as one of its essential components, the parochial school as an integral part of the church. For example, the Internal Revenue Service has interpreted the phrase "churches, their integrated auxiliaries, and conventions or associations of churches" in 26 U.S.C. §508(c)(1) to include religious schools. *See* 26 C.F.R. §1.508-1(a)(3)(a)

In 1954 the question of defining the term "church" arose before the U.S. Senate. The Senate Finance Committee in a report stated that the term church should be all inclusive and is intended to include organizations which, as integral parts of the church, are carrying out the functions of the church, whether as separate corporations or otherwise. *See* Senate Report No. 83-1622, 83rd Congress, 2d Session, page 30; *See also* 1955 *Summary of the Provisions of the Internal Revenue Code of 1954 (HR8300) as Agreed to by the Conferees,* p. 19.

The record in this matter clearly demonstrates that the services performed in the church schools are services in the employ of a church or convention or association of churches. We submit that where as here the actual em-

ployer is the church the exemption under Section 3309 (b) (1) (A) of FUTA belongs to the church as an entity, and that all of its employees are exempt.

Every court that has considered the merits of coverage of church schools under unemployment compensation statutes have concluded that they are exempt, or that it would be constitutionally impermissible to cover them. *See* Comment, *Bringing Christian Schools Within the Scope of the Unemployment Compensation Laws: Statutory and Free Exercise Issues,* 25 Vill. L. Rev. 69 (1979-80); *Grace Lutheran Church v. North Dakota Employment Security Bureau,* N.D., 294 N.W.2d 767 (1979); *Alabama v. Marshall,* 626 F.2d 366 (5th Cir. 1980); *Employment Division v. Archdiocese of Portland,* 42 Or. App. 421, 600 P2d 926 (1979); *Lutheran Church Missouri Synod v. Bowling,* 89 Ill. App. 3d 100, — N.E.2d — (1980); *Roman Catholic Church v. State of Louisiana,* La. App., 387 So. 2d 1248 (1980).

In *Alabama v. Marshall,* 626 F.2d 366 (5th Cir. 1980), in direct conflict with the South Dakota Court, the Court held that employees of church elementary and secondary schools were exempt from unemployment compensation taxes under section 3309(b) (1) (A) of FUTA. The Court succinctly stated:

> The statute plainly indicates that the exemption is contingent upon who the employer is and is not contingent upon the type of services the employee is performing. There is no question here that the persons performing services in these religious schools fall within the "in the employ of" language of the statute, therefore, if the employees involved are employed by a "church", the exemption belongs to them. Resolution of this question depends upon what is meant by "church" as used in the statute. We are convinced that the plain meaning of "church" re-

quires a definition as something qualitatively greater than the physical building of worship and, at a minimum, the term encompasses the legal entity commonly referred to as a church. The Secretary would avoid the legal consequences of this definition by excluding the very people which comprise a church as an entity and perform its functions. For this Court to adopt such a limited definition would be for us to ignore the historic function of churches and defy the definition of the word as used in our vocabulary.

C. Services Performed in Church Elementary and Secondary Schools Are also Exempt Because They are Services in the Employ of an Organization Operated Primarily for Religious Purposes

The South Dakota Supreme Court erroneously concluded that church elementary and secondary schools are not "operated primarily for religious purposes" required under the alternate exclusion provided under 26 U.S.C. §3909(b)(1)(B). (Pet. App. A6-A9)

The Appeals Referee for the South Dakota Department of Labor made numerous findings. Among them were the following:

> The object and purpose of the Wisconsin Evangelical Lutheran Synod, as set forth in its constitution is to extend and conserve the true doctrine and practice of the Evangelical Lutheran Church. One method of doing this is by establishing and maintaining schools. (Pet. App. A36)
>
> The Synod believes a theological basis exists for their schools. It holds the conviction that training youth involves both education and religion and that the two are so closely interwoven they cannot be separated; further, they operate their schools in accordance with these beliefs. (Pet. App. A36)

> *All* courses offered at the school which is a part of St. Martin's Evangelical Lutheran Church are taught from a religious viewpoint based on the Scriptural convictions of the Synod. (Pet. App. A39)
>
> The courses taught at Northwestern Lutheran Academy are taught from the same religious viewpoint as the courses taught at the school operated by St. Martin's Evangelical Lutheran Church. (Pet. App. A40)
>
> The Synod has both preaching ministers and male teaching ministers, both of whom have equal status in the church and can perform all of the sacerdotal functions of the Church. (Pet. App. A37-38)
>
> The teaching ministers at the Christian schools are considered part of the public ministry of the Wisconsin Evangelical Lutheran Synod. They receive a divine, lifelong "call" to the position in which they serve. (Pet. App. A37-A38)

The Appeals Referee's findings were based on the record made before it. Introduced was a comparison between the education offered by the Christian parochial school and the secular school (Pet. Exhibit 4, Adm. Record, pp. 106-112); a statement of the philosophy and objectives for Synod Christian day schools which shows the permeation of religious belief into the total curricula (Pet. Exhibit 5, Adm. Record, pp. 95-105); another statement of curriculum objectives to inculcate religious doctrine into everything that is taught (Pet. Exhibit 6, Adm. Record, pp. 91-94); and the Constitution of the Wisconsin Evangelical Lutheran Synod. (Pet Exhibit 3, Adm. Record, p. 113)

The role of the Christian school in the mission of the Wisconsin Synod was stated by Martin Luther in the Book of Concord 1580 which includes the Small Catechism of Martin Luther:

> The school must be next to the church . . . when the schools increase, all is well, and the church remains

> pure . . . for the sake of the church it is therefore, necessary to have and maintain schools, for God preserves the church through the schools.

The Wisconsin Synod's position on Christian schools is stated in *An Appraisal of Educational Principles in the Light of Scripture,* wherein it is stated:

> The Christian school is one of the most important agencies the Lord has given us to carry out His great missionary command in these chaotic times. Therefore let us pray to Him to strengthen our faith, . . . and grant us the courage to carry out His command to bring up the children in the nurture and admonition of the Lord. (Pet. Exhibit 4, Adm. Record, pp. 106-112)

The object and purpose of the Wisconsin Evangelical Lutheran Synod is to extend and conserve the true doctrine and practice of the Lutheran Church. To fulfill this mission the church has established Christian schools and holds the conviction that training of youth involves both religion and education which are so closely interwoven that they cannot be separated. (Pet. App. A36) The sole purpose in operating church schools is religious.

The Supreme Court of the United States has consistently acknowledged that parochial elementary and secondary schools are an integral part of the church and a vital part of its religious mission.

In *Meek v. Pittenger,* 421 U.S. 349, 365 (1975) the Court stated:

> It would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools . . .

At page 366 the Court, quoting from *Hunt v. McNair,* 413 U.S. 734, 743 (1973), referred to the schools as institutions "in which religion is so pervasive that a substantial portion of . . . their functions are subsumed in the religious mission . . ." The Court then explained (at 366):

> The church related elementary and secondary schools typify such religion-pervasive institutions. The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. *See Lemon v. Kurtzman,* 403 U.S. at 616-7 . . . The secular education those schools provide goes hand in hand with the religious mission that is the only reason for the school's existence. Within the institution, the two are inextricably intertwined.

In *Lemon v. Kurtzman,* 403 U.S. 602 (1970), at page 616, the Court explained:

> On the basis of these findings the District Court concluded that the parochial schools constituted an integral part of the religious mission of the Catholic Church. "The various characteristics of the schools make them a powerful vehicle for transmitting the Catholic faith to the next generation." This process of inculcating religious doctrine is, of course, enhanced by the impressionable age of the pupils, in primary school particularly. In short, parochial schools involve substantial religious activity and purpose.

Justice Douglas, in his concurring opinion, beginning at page 635, discusses the parochial school curriculum:

> But the problem only starts there. Sectarian instruction, in which, or course, a state may not indulge, can take place in a course on Shakespeare or in one on mathematics. No matter what the curriculum offers, the question is what is *taught* . . .

> It is well known that everything taught in most parochial schools is taught with the ultimate goal of religious education in mind.

In Footnote 20 to Justice Douglas' concurring opinion, at page 635, he states:

> In the parochial schools . . . indoctrination is included in every subject. History, literature, geography, civics and science are given a Roman Catholic slant. The whole education of the child is filled with propaganda. That, of course, is the very purpose of such schools, the very reason for going to all of the work and expense of maintaining a dual school system.

And on page 637, Justice Douglas continues:

> Parochial schools, in large measure, do not accept the assumption that secular subjects should be unrelated to religious teaching.

If it were not for the purpose of inculcating religious doctrine into the curricula, there would be no reason whatever to run a separate school system coterminous with that provided by the State. So important is this mission to the Synod, that it even provides a dual ministry, that of the teaching ministry and the preaching ministry. Synod schools exist *solely* for religious purposes.

The South Dakota Supreme Court's holding that the Christian schools are not primarily religious results in the incongruous determination that parochial schools are an integral part of the church so as to be denied state aid, but that they are a separate and distinct entity from the churches that are not religious enough to be exempt from the unemployment compensation tax. In *Catholic Bishop v. NLRB,* 559 F.2d 1112, 1119 (7th Cir. 1977), the Court recognized this incongruous result when it stated:

> . . . the Board is cruelly whip-sawing their schools by holding that institutions too religious to receive

governmental assistance are not religious enough to be excluded from its regulation.

(*See also McCormick v. Hirsch,* 460 F.Supp. 1337, 1352, 1358 (M.D. Pa. 1978)

D. The Department of Labor's Interpretation Should not Have Been Entitled to Great Deference by the South Dakota Supreme Court

The South Dakota Supreme Court states that "when faced with the problem of statutory construction, we must show great deference to the interpretation given such statutes by the agency charged with their administration." (Pet. App. A9) The Court then referred to the Department of Labor's interpretation of the 1970 amendments relating to *institutions of higher education,* and infers a consistent construction by the department.

The legislative history and the department's inconsistent interpretation do not support the South Dakota Supreme Court. Immediately after the 1976 Amendments were passed, the Department of Labor issued its advice that the deletion of 3309(b)(3) of FUTA "does not affect the optional exclusion of 3309(b)(1)" for church related schools. (J.A. 34) Again in February, 1977, the Department of Labor in another memorandum to state agencies reconfirmed that "[the] changes made in Section 3309 by P.L. 94-566 do not change the application of the exclusions in Section 3309(b)(1)(A) and (B)." (J.A. 36) Completely reversing itself more than a year later, on May 30, 1978, the Department of Labor advised the states that church elementary and secondary schools would have to be included by the states in their unemployment compensation laws. (J.A. 40) This last interpretation by the Department of Labor was not consistent

with its earlier interpretation, nor was it contemporaneous.

"Great deference" by the Courts to an administrative agency's interpretation of a statute was discussed in *General Electric Co. v. Gilbert*, 429 U.S. 125, 140-145 (1976). *See also, Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). In *General Electric Co., supra,* 142, the Court states:

> The weight of such judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . .

Applying these standards to the Department of Labor's last interpretation of the exemptions provided for in section 3309(b)(1) of FUTA the department does not fare well. The latest interpretation by the department in 1978 was not a contemporaneous interpretation and certainly was not consistent with its earlier interpretations.

In *General Electric Co., supra,* 143, the Supreme Court states that "[W]e have declined to follow administrative guidelines in the past where they conflicted with earlier pronouncements of the agency."

The most difficult obstacle to according any deference to the latest interpretation by the Department of Labor is that it contradicts the plain language of section 3309 (b)(1) of FUTA and goes far beyond any expressed Congressional intent. "Administrative determinations must have a basis in law and must be within the granted authority . . ." *Social Security Board v. Nierotko,* 327 U.S. 358, 369 (1945)

II. THE DECISION BY THE SOUTH DAKOTA SUPREME COURT IS CONTRARY TO THE DECISION IN *NLRB v. CATHOLIC BISHOP*, 440 U.S. 490 (1979), BECAUSE THERE WAS NO CLEAR EXPRESSION BY CONGRESS OF AN AFFIRMATIVE INTENT TO BRING CHURCH SCHOOLS WITHIN STATE UNEMPLOYMENT COMPENSATION LAW.

As we will show in Section V below, if church schools are brought within state unemployment compensation laws the state would become entangled in church affairs in that church officials would be required to file reports with state agencies, keep work records which would be open at any time to state officials, answer subpoenas for information, respond to claims for benefits, participate in hearings on benefit eligibility, and be liable for civil and criminal penalties for noncompliance with the law. Another problem arises in determining whether an employee is discharged for misconduct or has terminated his employment without cause. Yet another problem involves the determination of what part of a teacher's employment is "religious" and what part is "secular". All of this church-state involvement raises serious constitutional questions under the First Amendment. This being so, there must be "an affirmative intention of the Congress clearly expressed" to require that church elementary and secondary schools be brought within unemployment compensation law. *See NLRB v. Catholic Bishop*, 440 U.S. 490 (1979) In the legislative history of the case before this Court there is no evidence whatever of such Congressional intent.

The Solicitor of Labor in discussing Section 3309(b)(1) of FUTA admits that "if subsection (1) applied to

church-related elementary and secondary schools prior to the 1976 amendments it continues to apply since the legislative history is silent." (J.A. 52)

The South Dakota Supreme Court refers to an estimated figure of 242,000 employees of non-public elementary and secondary employees to justify his conclusion of intent by Congress to include church schools under unemployment compensation law (Pet. App. A8), referring to S. Rep. No. 94-1265, 94th Cong., 2d Sess. (1976), at 8. The footnote to the figure given in that Senate Report then refers to 261,000 full time teachers in non-profit schools, a figure 19,000 higher than the 242,000 referred to, which figure does not include other school employees. There is no evidence that Congress understood this figure and it can hardly now be taken as a "clear" expression of Congressional intent to cover church elementary and secondary schools. (*See U.S. Department of Labor Administrative Law Judge Recommended Decision in Conformity Proceeding involving United States Department of Labor vs. Alabama and Nevada*, J.A. 19, at 31)

The fact that Congress manifested its concern to the constitutionality of its coverage of state employees (S. Rep. No. 94-1265, 94th Cong., 2d Sess. (1976) at 8-9), yet failed to mention the more obvious constitutional questions involving parochial school coverage, or even refer to or mention church elementary and secondary schools in its reports makes it seem incomprehensible that Congress intended the 1976 Amendments to remove church schools from the exemptions it previously granted under Section 3309(b)(1) of FUTA.

III. THE ELIMINATION OF THE EXCLUSION FOR SERVICE IN THE EMPLOY OF A SCHOOL DOES NOT AFFECT THE EXCLUSION FOR SERVICE IN THE EMPLOY OF A CHURCH.

In 1976 when FUTA was amended by the Unemployment Compensation Amendments of 1976, the states were required, among other things, to extend coverage to most state and local government employees, agricultural workers and domestic servants. At this time the exemption for service performed "in the employ of a school which is not an institution of higher education" was eliminated, but significantly, the exemptions for services performed in the employ of a church provided for in section 3309 (b) (1) were not disturbed. The school exclusion had to be removed so that there would be no inconsistency concerning coverage of public school employees and nonprofit schools other than church elementary and secondary schools.

IV. THERE IS NO EVIDENCE OF CONGRESSIONAL INTENT TO INCLUDE CHURCH ELEMENTARY AND SECONDARY SCHOOLS UNDER UNEMPLOYMENT COMPENSATION LAW.

The Supreme Court of South Dakota erroneously concluded that Congress "apparently" intended the states to extend their unemployment compensation laws to parochial elementary and secondary schools. (Pet. App. A5-A8) It did not find a clear expression of congressional intent but, rather, an "apparent" intent.

The Department of Labor recognized that the exemptions might continue to apply to church schools because

the legislative history is silent. The Solicitor of Labor, discussing Section 3309(b)(1) of FUTA admits that "if subsection (1) applied to church-related elementary and secondary schools prior to the 1976 amendments it continues to apply *since the legislative history is silent.*" (Emphasis added) (J.A. 52)

The South Dakota Supreme Court cites The House Ways and Means Committee Report (H.R. Rep. No. 91-612, 91 Cong., 1st Sess., 11 (1969) which it says demonstrates Congressional intent in 1970 to extend coverage to religious organizations (Pet. App. A6) The South Dakota Supreme Court ignores the fact that Congress provided a specific exemption for services performed in the employ of a church or convention or association of churches (Title 26 U.S.C. §3309(b)(1)(A), and a specific exemption for an organization which is operated primarily for religious purposes and which is "operated . . . by a church or convention or association of churches . . ." (Title 26, U.S.C. §3309(b)(1)(B), and further specific exemption for *all* elementary and secondary schools. (Title 26, U.S.C. §3309(b)(3).

The Court cites further language from the same Congressional report, H.R. Rep. No. 91-612, 91 Cong. 1st Sess. 44 (1969) and identical language in S.Rep. No. 91-752, 91 Cong., 2d Sess. (1970), at 48-59, U.S. Code, Cong. and Admin. News 1970, p. 3606, which reads as follows: (Pet. App. A6-A7)

> This paragraph excludes services of persons where the employer is a church or convention or association of churches, but does not exclude certain services performed for an organization which may be religious in orientation unless it is operated primarily for religious purposes and is operated, supervised, controlled or principally supported by a church (or

> convention or association of churches). Thus, the services of the janitor of a church would be excluded, but services of a janitor for a separately incorporated college, although it may be church related, would be covered. A college devoted primarily to preparing students for the ministry would be exempt, as would be a novitiate or a house of study training candidates to become members of religious orders. On the other hand, a church related (separately incorporated) charitable organization (such as, for example, an orphanage or home for the aged) would not be considered to be operated primarily for religious purposes.

The quoted language from these Congressional reports show that Congress intended the exemptions it provided in section 3309(b)(1) of FUTA to depend on *the nature of the empolying organization* and not the kind of services performed such as in the case of the janitor for the church. When Congress referred to "church related" organizations as "separately incorporated", it recognized that services performed at a school with no legal existence apart from the church are services performed *in the employ of* the church and thus, exempt from coverage under section 3309(b)(1)(A) of FUTA.

The South Dakota Supreme Court also emphasizes the Congressional Committee's statements relating to church-related colleges as being conclusive in construing the "operated primarily for religious purposes" language in section 3309(b)(1)(B) of FUTA ignoring the fact that there are "inherent differences between the college level and the elementary and secondary level of education at church affiliated schools." (*Americans United for Separation of Church and State v. Bubb,* 379 F. Supp. 872, 891 (D. Kan. 1974). The Supreme Court of the United States recognizes the inherent differences between church ele-

mentary and secondary schools and religiously affiliated colleges stating that "the affirmative if not dominant policy of the instruction in pre-college church schools is to assure future adherents to a particular faith by having control of their total education at an early age. . . ." *Tilton v. Richardson,* 403 U.S. 672, 685, 686 (1971) citing *Walz v. Tax Commission,* 397 U.S. 664, 671 (1970) Also, institutions of higher learning have a higher degree of academic freedom and that "by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines." (*Tilton v. Richardson, supra,* at 686)

Congressional discussion of separately incorporated church affiliated colleges is irrelevant in considering the section 3309(b)(1) FUTA exemptions granted to church elementary and secondary schools, especially when Congress explicitly limited the section 3309(b)(3) exemption to a school which is *"not an institution of higher education."*

V. SUBJECTING CHURCH ELEMENTARY AND SECONDARY SCHOOLS TO UNEMPLOYMENT COMPENSATION LAW VIOLATES BOTH THE ESTABLISHMENT AND FREE EXERCISE CLAUSES.

A. General Principles of Case Law — Introduction

The First Amendment to the Constitution of the United States consists of two distinct clauses, an "Establishment" Clause and a "Free Exercise" Clause. In *Walz v. Tax*

Commission, 391 U.S. 664, 669 (1969) the Court stated thus:

> [T]he basic purpose of these provisions . . . is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion.

Establishment of a religion connotes "sponsorship, financial support, and active involvement" of government in religious activity. *Walz, supra,* at 668. This First Amendment prohibition does not "simply prohibit the establishment of a . . . church or . . . religion . . ." but instead, commands "that there should be no law *respecting* an establishment of religion." What this means is that there cannot be any step taken by government that could lead to the establishment of a religion. *See Lemon v. Kurtzman,* 403 U.S. 602, 612 (1971) And, at page 612 and 613 the Court concludes (*Lemon, supra*),

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen,* 392 U.S. 236, 243 (1968); finally, the statute must not foster "an excessive government entanglement with religion." *Walz, supra,* at 674.

For further discussion of the three part test developed by the Court in establishment cases *see also, Wolman v. Walter,* 433 U.S. 229, 235-236 (1977); *Roemer v. Board of Public Works,* 426 U.S. 736, 748 (1976); *Committee for Public Education v. Nyquist,* 413 U.S. 756, 772-773 (1973).

The Court has also used a three-tiered process in evaluating the "Free Exercise" Clause. In *Wisconsin v. Yoder,* 406 U.S. 205 (1972) the Court held that Wisconsin's compulsory school attendance law violated the free exercise rights of Amish parents who refused to send their children to school after the eighth grade. The Court considered, first, whether the religious claims of the Amish were rooted in a legitimate and sincerely held religious belief (at page 215-216); second, the extent of the governmental burden or inhibition on the free exercise rights of the Amish (at page 217-219); and finally, whether there is "a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." (page 214; *see also,* pages 219-234; and, *Sherbert v. Verner,* 374 U.S. 398, 406 (1963)

For an analysis of the Free Exercise Clause and its relationship to parochial schools See Comment, *Bringing Christian Schools Within the Scope of the Unemployment Compensation Laws: Statutory and Free Exercise Issues,* 25 Vill. L. Rev. 69, 102-117 (1979-80).

It is submitted that South Dakota has violated *both* of the Religion Clauses of the First Amendment under well defined case law authority.

B. Coverage of Church Elementary and Secondary Schools Violates the Establishment Clause

The major constitutional problem is whether the "increased involvement" between the state and the church resulting from coverage of church schools constitutes excessive government entanglement with religion as formulated by the Court in *Walz v. Tax Commissioner,* 397 U.S. 664, 674 (1970).

The requirement of filing regular reports with state agencies, keeping extensive work records which would be open at any time to state officials for inspection, being subject to enforcement of perceived non-compliance with agency orders or rules, having to respond to claims for benefits, as well as being forced to participate in hearings on eligibility for benefits brings the state directly into an administrative relationship with the Church which the Court warned against in *Walz, supra,* at 672, 675, 695.

In a similar regulatory scheme the First Circuit held as unconstitutional a government investigation of rising educational costs at Church Schools. (*Surinach v. de Busquets,* 604 F.2d 73 (1st Cir. 1979) In *Surinach,* (Id. at p. 78) the court recognized that the government's ongoing powers necessary to ensure compliance with its orders and regulations, from compelling the keeping of records and the providing of testimony to the continuing inspection of papers and physical facilities "[have] the 'self-perpetuating and self-expanding propensities' which have alerted courts to an increased danger of an unconstitutional degree of entanglement." *See also, Catholic Bishop v. NLRB,* 559 F.2d 1112 (7th Cir. 1979), *aff'd.* on other grounds, 440 U.S. 490 (1979); and, *McCormick v. Hirsch,* 460 F.Supp. 1337, 1357 (M.D. Pa. 1978). While *Surinach, supra,* and *Catholic Bishop, supra,* technically were decided on "Free Exercise" grounds, they were decided on the basis of excessive government entanglement.

There cannot be total separation between church and state, such as in the case of fire inspections, building and zoning regulations and state requirements under compulsory school attendance laws (*Lemon v. Kurtzman,* 403

U.S. 602, 614 (1970). The test to determine excessive entanglement is one of degree (*Walz, supra,* 674).

The degree of state involvement becomes overly severe in two instances: when a determination has to be made of what services at the church school are "strictly church duties" and when a determination has to be made on termination of employment for eligibility of benefits.

The U.S. Department of Labor Unemployment Insurance Letter No. 39-78, dated May 30, 1978 (J.A. 40) provides that if an employee performs both non-exempt and exempt services during a single employment period, as in the case of services performed for a church related school and a church, and the exempt service amounts to more than 50%, then all of the services of the employee would be exempt.

When Synod teachers receive their "divine, life-long call" from the church in which they are asked to serve (Findings of Fact X, Pet. App. A37-A38; *See, also,* decision by South Dakota Supreme Court, Pet. App. A-14) they have as a specific "church duty" the responsibility of inculcating religious doctrine into everything that is taught (Findings of Fact, XIV, XIX, Pet. App. A39, A40); *See also,* Exhibit 27, Administrative Record, pp. 26, 27). In addition, a janitor and church secretary might perform services for both the church and the school which is a part of the church. A teacher might, as part of his or her prescribed duties, teach Sunday School in the church basement or the school basement, play the organ for church services and be responsible for the church choir. There might be "church" functions in the school and "school" functions in the church. Thus, it becomes necessary to determine in each instance what activities are purely "religious" and what are "secular". That con-

troversies will arise, for example, as to whether in a world history class the teacher spends more than one-half of any given session teaching purely "religious" or purely "secular" history can hardly be subject to doubt. This "puts a public investigator into every classroom and entails . . . pervasive monitoring . . ." (*Lemon v. Kurtzman,* 403 U.S. 602, 629 (1971)

In *Lemon, supra,* the court held unconstitutional a salary supplement program for teachers of secular subjects at non-public elementary schools. The court, speaking on entanglement, said: (*Id.,* 620)

> The Statute excludes teachers . . . whose average per-pupil expenditures on secular education equal or exceed the comparable figures for public schools. In the event that the total expenditures of an otherwise eligible school exceed this norm, the program requires the government to examine the school's records in order to determine how much of the total expenditures is attributable to secular education and how much to religious activity. This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids.

McCormick v. Hirsch, 460 F.Supp. 1337, 1351-1352 (M.D. Pa. 1978) summarized the factors considered by the Supreme Court in the then recent establishment cases: (*Id.* 1352)

> The Court . . . has shown a particular concern and has *sought to avoid* active involvement of the sovereign in religious activities, the risks inherent in programs that bring about an administrative relationship between public bodies and church-sponsored schools, governmental evaluation and standards with respect to religious practices, any kind of day-to-day relationship between church and state, extensive investigation into church operations or finances, any

> sustained or detailed administrative relationship for enforcement of statutory or administrative standard, inherent difficulties in the combination of religious discipline and the possibility of disagreement between teacher and religious authorities over the meaning of statutory restrictions, and the entanglement of government in difficult classifications of what is or is not religious. The listing of these suspect areas of entanglement illustrates the kinds of involvement with a church entity that will simply not be tolerated. (Footnotes omitted)

Government involvement becomes even greater when it engages in difficult classifications of what is or is not religious. "The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment . . ." (*New York v. Cathedral Academy,* 434 U.S. 125, 133 (1977)

Excessive entanglement also occurs when a teacher's employment is terminated. Under Unemployment Compensation Law an employee who is discharged for misconduct or terminates his employment without cause may have his benefits denied or reduced. (*See* S.D. Compiled Laws Ann §61-6-13 and 14) Thus, it becomes important to determine the reasons for termination. This intrudes the state into religious law and polity. Synod teachers, having accepted a "life-long call" are required to teach Synod doctrine and belief by both word and deed. If a teacher were discharged for teaching contrary to Synod doctrine and belief, or voluntarily terminated employment, the teacher could request a hearing to determine if unemployment compensation benefits were due. [*See* 42 U.S.C. §503(a)(3)] This hearing would involve doctrinal questions of belief and the hearing examiner would have to rule on these issues. It is submitted that civil

authorities are constitutionally prohibited from determining church doctrine in resolving what actually would be an ecclesiastical dispute. (*See Serbian Orthodox Diocese v. Melivojevich,* 426 U.S. 696 (1976); and *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94 (1952)

Catholic Bishop v. NLRB, 559 F.2d 1112 (7th Cir. 1977), *aff'd* on other grounds, 440 U.S. 490 (1979), demonstrates the constitutional problems that would be involved in a civil inquiry of the reasons for discharge of a parochial school teacher.

The South Dakota Supreme Court acknowledged that the teachers in Synod schools are not under contract but are under a "call" and that this being so there are only two ways a teacher can be released from that call; by teaching false doctrine and by misconduct as outlined by church standards. (Pet. App. A14) Therefore, that Court says the only finding needed to determine eligibility is simply whether the employee was fired or laid off. (Pet. App. A14) Apparently the South Dakota Supreme Court is saying that the resolution of an unemployment compensation claim would not require an adjudication of what is or is not church doctrine. We strongly disagree. The issue "most frequently disputed" in connection with claims for unemployment is the reason for termination of employment (*California Department of Human Resources Development v. Java,* 402 U.S. 121, 126 (1971). *See also,* Comment, *Bringing Christian Schools Within the Scope of the Unemployment Compensation Laws: Statutory and Free Exercise Issues,* 25 Vill. L. Rev. 69, 81 (1979-80). There would be a "necessity of explanation and analysis, and probably verification and justification of the doctrinal precept involved." (*Catholic Bishop, supra,* 1125). Otherwise there would be an accommoda-

tion to the church. *Catholic Bishop, supra,* 1126, said this about accommodation:

> We fail to comprehend the real possibility of accommodation in the present context without someone's constitutional rights being violated . . .

Judge Sprecher, in his concurring opinion added: (*Catholic Bishop, supra,* 1128)

> In concurring with Judge Pell's persuasive opinion, I would only add that the National Labor Relations Board, in attempting to steer a course between the Scylla and Charybdis of the Establishment and Free Exercise Clauses, has collided with one and fallen into the other. The Board's assertion of jurisdiction will have the effect of inhibiting the practice of religion by regulating it, yet by conceding that this will inexorably force it to "accommodate" and prefer religious employers and conversely to discriminate against secular employers in like situations, it will in the constitutional sense "establish" the religions with which it deals.

We see no way a claims examiner could steer a course between Scylla and Charybdis to avoid First Amendment problems if a parochial school teacher's employment were terminated on alleged doctrinal grounds.

In *NLRB v. Catholic Bishop,* 440 U.S. 490, 502 (1979) the Court referred to the charges of unfair labor practices that were filed against Catholic elementary and secondary schools including the dismissal of a teacher for teaching a doctrine at odds with the tenets of the Roman Catholic faith, or for adopting a lifestyle contrary to Catholic moral teachings (*See Catholic Bishop v. NLRB,* 559 F. 2d 1112, 1125-1126 (7th Cir. 1977). The Court said:

> The resolution of such charges . . . will necessarily involve inquiry into the good faith of the position

> asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached . . . which may impinge on rights guaranteed by the Religion Clauses, but the very process of inquiry leading to findings and conclusions.

In a similar case to that of *Catholic Bishop, supra, McCormick v. Hirsch,* 460 F.Supp. 1337, 1355 (M.D. Pa. 1978) the court noted that the National Labor Relations Board would have to determine if a firing was for union or ecclesiastical concern, and that this determination of what is church doctrine and whether it applies would be unconstitutional under the "Free Exercise" Clause.

While the purpose of extending unemployment compensation laws to church schools is not intended to advance or inhibit religion, we submit that the effect of such extension would have the potential to do just that. (*Board of Education v. Allen,* 352 U.S. 236, 243 (1968). What might be "primarily religious" or "religious doctrine" or even "religious belief" might mean one thing to a Wisconsin Synod Lutheran yet quite another to a person of another faith or even a person of no faith. This could lead to the advancing of one religion and the inhibiting of another. This leads to "a relationship pregnant with dangers of excessive government direction of church schools and hence, of churches." *Lemon v. Kurtzman,* 403 U.S. 602, 620 (1971) History cautions that political fragmentation on sectarian lies should be guarded against (*Walz, supra,* 695, 698). The extension of unemployment compensation laws to church elementary and secondary schools aggravates the potential for political divisiveness related to religious belief and practice. (*See Lemon v. Kurtzman,* 403 U.S. 602, 622, 623

(1971). The undisputed facts and the Appeals Referee's findings show that the purpose of Northwestern Lutheran Academy is to provide an education at the secondary level to those who plan to enter the ministry of the church. (Findings of Fact V, XVI, XVII, Pet. App. A36, 37, 39, 40) Against these uncontradicted facts the Appeals Referee concludes that the primary purpose of the Academy is not religious. (Pet. App. A44) The ability to make conclusions at such variance from the facts demonstrate the potential for "advancing" one religion and "inhibiting" another.

C. Coverage of Church Elementary and Secondary Schools Violates the Free Exercise Clause

Extension of unemployment compensation laws to church schools would offend the "Free Exercise" Clause because it would "interfere with religious beliefs and practices or have the effect of doing so." *Walz v. Tax Commission,* 397 U.S. 664, 669 (1970)

Church schools are an exercise of religion. (*See* Comment, *The Free Exercise Clause, The NLRA, and Parochial School Teachers,* 126 U. Pa. L. Rev. 631, 641, 642 (1978) They are the *"raison d'etre"* for the propagation of a religious faith (*Lemon v. Kurtzman,* 403 U.S. 602, 628 (1971) The school is "the church itself". (*McCormick v. Hirsch,* 460 F.Supp. 1337, 1353 (M.D. Pa. 1978) That church elementary and secondary schools are rooted in legitimate and sincerely held religious beliefs cannot be disputed.

While excessive entanglement arose out of the church-aid establishment cases, it is submitted that it is applicable to the "Free Exercise" Clause because it relates to governmental interference with religion. Support for this

conclusion can be found in *McCormick v. Hirsch, supra,* 1353-1356. The court there expressly stated that the "areas that burden or inhibit the religious practices . . . also involve entanglement problems . . ." Thus, all that has been said about entanglement applies to demonstrate the burdening or inhibiting of the religious practices of the Synod in the maintenance of its elementary and secondary schools.

In *NLRB v. Catholic Bishop,* 440 U.S. 490, 496 (1979) the Court referred to the 7th Circuit decision (559 F.2d at 1124). That court referred to the "chilling aspect" of parochial schools being made subject to the National Labor Relations Act. The example cited by the 7th Circuit involved the discharge of a teacher who one week gave a pro-union speech and the next advocated the cause of birth control. The bishop would then be confronted with the choice of foregoing his right to discharge the heretical teacher or to do so at the risk of a protracted and expensive proceeding which would involve the Church's religious policies and beliefs. (*See also McCormick v Hirsch,* 460 F.Supp. 1337, 1355 (M.D. Pa. 1978) We submit the same "chilling aspect" would be present in the case of a teacher termination if church elementary and secondary schools were brought within state unemployment compensation law.

In *Braunfield v. Brown,* 366 U.S. 599 (1961), Sunday closing laws were upheld against the objection of individuals whose religious practices required them to close their businesses on Saturday. The Court in *Braunfield* considered the effect on religious activity to be only indirect. (*Id.* 605-609) In *Sherbert v. Verner,* 374 U.S. 398 (1963) the Court held the application of unemployment compensation laws unconstitutional in denying benefits to a Seventh Day Adventist who refused to accept

Saturday work contrary to her religious belief. While the Court did not find a "direct" burden in *Sherbert, supra,* it is significant that in *Braunfield, supra,* the law affected the business activities of the complainant, while in *Sherbert, supra,* the complainant's personal religious practices would have been affected by having to accept Saturday work. Similarly, like *Sherbert, supra,* and *Wisconsin v. Yoder, supra,* if church elementary and secondary schools are included under unemployment compensation law the burden would directly involve the exercise of religious practices and not a business activity as in *Braunfield, supra.*

No one can deny the socio-economic importance of unemployment compensation law; but, we submit it is not a state interest of sufficient magnitude to override the fundamental rights provided for under the Religion Clauses as stated in *Wisconsin v. Yoder, supra,* 214. Furthermore, there is no showing that the least restrictive goals have been chosen to meet the objects sought to be achieved by extending unemployment compensation law to church elementary and secondary schools. In *Barnett v. Rodgers,* 410 F.2d 995, 1000 (D.C. Cir. 1969) the court pointed out this second requirement of an equally convincing showing that there is no other way to reach the goals desired. This Court said in *Wisconsin v. Yoder, supra,* 215:

> The essence of all that has been said and written on the subject is that only those interests of the highest order *and those not otherwise served* can overbalance legitimate claims to the free exercise of religion. (Emphasis supplied).

There is a substantial inhibition on those who are brought within state unemployment compensation laws. The court in *Catholic Bishop v. NLRB,* 559 F.2d 1112,

1124 (7th Cir. 1977), *aff'd.* on other grounds, 440 U.S. 490 (1979), speaking about compulsory bargaining, said this:

> ". . . [O]n the general industrial and commercial scene sound policy considerations have upheld this imposition, inhibiting though it may be . . . We do not disagree with the soundness of the legislative policy determinations which have been consistently upheld by the courts. We only say that when that imposition conflicts with the Religion Clauses that the First Amendment protective wall should prevail. See Sherbert v. Verner, 374 U.S. 398, 406-09 (1963).

We submit that what was said in *Catholic Bishop, supra,* should apply here.

CONCLUSION

The South Dakota Supreme Court erred in every respect. It ignored the plain language of the exemptions provided by Sections 3309(b)(1)(A) and (B) and the corresponding South Dakota Statutes; it attempts to find support in what it calls "apparent" Congressional intent where none exists; and, it fails to apply general principles of case law established by the Supreme Court of the United States guaranteeing religious freedoms protected by the First Amendment to the Constitution of the United States.

The petitioners, St. Martin Evangelical Lutheran and Northwestern Lutheran Academy, request the Court to reverse and set aside the Decision by the South Dakota Supreme Court.

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NO. 80-120

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH and NORTHWESTERN LUTHERAN ACADEMY,

Petitioners,

v.

THE STATE OF SOUTH DAKOTA,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

BRIEF OF THE RESPONDENTS

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NO. 80-120

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH and NORTHWESTERN LUTHERAN ACADEMY,

Petitioners,

v.

THE STATE OF SOUTH DAKOTA,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

STATEMENT OF THE CASE

In 1977, the State Legislature amended SDCL 61-1-10.4 so that it would conform to the federal law concerning unemployment taxation. In 1976, Congress amended the Unemployment Compensation Act and specifically eliminated the exclusion for service performed in the employ of nonprofit elementary and secondary schools. The Petitioners in this case contend that under SDCL 61-1-10.4, they are still exempt from the payment of unemployment taxes on their school

personnel. Petitioners received a hearing before a hearing examiner from the Department of Labor. The Examiner held that they were responsible for paying the taxes. Petitioners asked for a review. The Appeals Referee from the Department of Labor entered his decision on September 15, 1978, holding that the Petitioners must pay the unemployment tax. The Petitioners appealed to the Circuit Court in Hughes County and Judge Miller on April 2, 1979, reversed the Appeals Referee and held that the Petitioners were exempt from paying the unemployment tax. The State of South Dakota appealed to the Supreme Court of that state and the case was reversed March, 1980.

Northwestern Lutheran Academy is a four-year preparatory school for entrance at Northwestern College or Dr. Martin Luther College in preparation for the preaching and teaching ministry of the Wisconsin Evangelical Lutheran Synod. Its faculty consists of five pastors and five teachers. St. Martin's Evangelical Lutheran Church is a Lutheran church of the Wisconsin Evangelical Lutheran Synod and operates an elementary school whose faculty consists of two male teachers, claimed to be "ministers of a church" and four other teachers.

Northwestern Lutheran Academy, which is not separately incorporated, and St. Martin's Evangelical Lutheran Church, which is separately incorporated as a church under South Dakota law, are both exempt organizations under Sec. 501(c)(3) of the Internal Revenue Code pursuant to a group ruling issued to the Wisconsin Evangelical Lutheran Synod, as are all other affiliates of the Wisconsin Evangelical Lutheran Synod, whether separately incorporated or not.

Prior to January 1, 1978, SDCL 61-1-10.4, provided

that covered employment for unemployment compensation purposes did not apply to service performed:

(1) In the employ of

(a) a church of convention or association of churches, or

(b) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches; or

(2) By a duly ordained, commissioned or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or

(3) In the employ of a school other than a state school which is not an institution of higher education; or

. . .

Pursuant to PL 94-566, the "Unemployment Compensation Amendments of 1976," the South Dakota Legislature in effect repealed subsection (3) of SDCL 61-1-10.4, by S.D. Sess.L. 1977, ch. 420, effective January 1, 1978.

STATUTORY BACKGROUND

Even at the height of the Great Depresson of the 1930's when unemployment in the nation remained for several years above 25 percent of the work force, the States had almost uniformly failed to enact unemployment compensation laws. Consequently, in Title IX of

the Social Security Act of 1935, 49 Stat. 62, the forerunner of the FUTA (Federal Unemployment Tax Act, 26 U.S.C. § 3301 et seq.), Congress imposed on employers, with eight or more employees, an excise tax consisting of a percentage of wages payable for services performed in "employment" as defined in the Act. 49 Stat. 635.[1] At the same time, the taxpayer could get a credit against his federal tax liability for up to 90 percent of his contributions into a State unemployment fund established under a federally approved State unemployment compensation law. 49 Stat. 639-640.[2] In addition, Congress also provided in Title III of the Social Security Act (now codified at 42 U.S.C. §§ 501-504) for federal grants to the States to pay for costs incurred in administering the state laws. 49 Stat. 626. Subsequently, every state enacted an unemployment compensation law meeting the requirements for federal approval.[3] For many years, no provisions of the federal statutes required the state laws to cover any specific class of employees in either the public or the private section. Nevertheless, the state laws in the main paralleled the coverage of the FUTA (See, e.g., the SDCL 61 et seq.) in order to obtain the benefits of the tax credit provisions for the local employers and reimbursement of certain costs by the federal government.

[1] Neither the original Social Security Act nor the FUTA has subjected nonprofit organizations, such as the instant Petitioners, to any federal unemployment or "excise" tax. This is because the definition of "employment" excludes service performed in the employ of a religious, charitable, educational, or other income tax exempt organization. See 26 U.S.C. 3306(c) (hereinafter "§ 53306(c)"), as amended by the Unemployment Compensation Amendments of 1976, P.L. No. 94-566, 90 Stat. 2667.

[2] These basic provisions have been continued under the FUTA. See 26 U.S.C. §§ 3301 and 3302, as amended, 1976.

[3] See 26 U.S.C. § 3304(a) (hereinafter "§ 3304(a)"), as amended, 1976, for correct requirements.

The federal unemployment or "excise" tax provisions remained substantially unchanged for the first two decades after their enactment, although in 1939 they were made part of the Internal Revenue Code. See 1600 et seq. of the Internal Revenue Code of 1939, 53 Stat. 1, 183. Beginning in the mid-1950's however, there commenced a steady expansion of unemployment insurance coverage. Thus for example, in 1954, the Congress extended the tax liability to employers with four or more employees and enacted an unemployment compensation program for federal employees. See, Pub.L. No. 81-167. 68 Stat. 1130. In 1958, an unemployment compensation program was enacted for ex-servicemen. See Pub.L. No. 85-848, 72 Stat. 1086, 1088.

The most far-reaching revisions in the Federal-State Unemployment Compensation Program, however, were enacted under the Employment Security Amendments Act of 1970, Pub.L. No. 91-373, 84 Stat. 695. These amendments not only extended coverage to employers of one employee (84 Stat. 696), but, more importantly, added subsection (5)(a) and (B) to the existing § 3304(a) and a new § 3309 to the Internal Revenue Code of 1954 ("53309").

The new § 3304(a) (6)(A) required state laws to cover, for compensation purposes, employees of nonprofit organizations and employees of state hospitals and institutions of higher education. 84 Stat. 697. Section 3304(a) (6)(B), in turn, provided that the nonprofit organization must be afforded the opportunity to elect to make payments in lieu of contributions by payng into the state unemployment compensation fund amounts equal to the amount of unemployment benefits attributed under the state law to service in the employ of the particular employer. See 26 U.S.C. § 3309(a)(2) (1970).

Subparagraph (b) of the new § 3309 permitted the states to exclude, *inter alia*, from the mandatory coverage of nonprofit organizations and state hospitals and institutions of higher education, service performed (see 84 Stat. 697-698):

> (1) in the employ of (A) a church or convention or association of churches, or (B) organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches . . . See 26 U.S.C. § 3309(b)(1) (1970);
>
> (2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order (See 26 U.S.C. § 3309(b)(2) (1970));
>
> (3) in the employ of a school which is not an institution of higher education (See 26 U.S.C. § 3309(b)(3) (1970));

Even the increasingly expanded Federal-State Unemployment Compensation Program, however, proved inadequate in the 1974-1975 economic downturn. Late in 1974, the Congress passed two remedial laws as temporary measures. The Emergency Unemployment Compensation Act of 1974 (Pub.L. No. 93-573, 88 Stat. 1869) was similar to its predecessor, the Emergency Unemployment Compensation Act of 1971, (See Pub.L. No. 92-224, 65 Stat. 810) and further extended benefits for individuals in the regular unemployment compensation programs. The Emergency Jobs and Unemployment Assistance Act of 1974 (Pub.L. No. 93-567, 88 Stat. 1845) enacted in Title II, a Special Unemployment Assistance ("SUA") Program. This program was in-

tended to cover an estimated 12 million workers who were not covered by the regular unemployment compensation laws, including primarily state and local government employees, agricultural workers, and domestic employees. See House Report No. 93-1528, 4 U.S. Code Cong. and Adm. News, 93rd Cong., 2nd Sess. 6756, 6758, 6760-6768 (1975). The SUA program was administered by state unemployment compensation agencies as the agents of the Secretary of Labor, with the federal government assuming the costs of benefits and of program administration. See Section 202 of the Emergency Jobs and Unemployment Assistance Act of 1974, §§ Stat. 1850.

The SUA program was in effect, replaced by the Unemployment Compensation Amendments of 1976, Pub.L. No. 94-566, 90 Stat. 2667. These amendments were designed to provide coverage under the permanent Federal-State Unemployment Compensation Program for substantially all the nation's wage and salary earners and thereby to eliminate the need for the temporary SUA program. H.R. Rep. No. 755, 94th Cong., 1st Sess. 1 (1975). The 1976 amendments specifically eliminated the exclusion for service performed in the employ of nonprofit elementary and secondary schools which had been added in 1970, as part of the new § 3309(b) of the Internal Revenue Code of 1954.

The Federal Unemployment Tax Act is a comprehensive plan for unemployment compensation allowing for state and federal participation in its administration. Section 3301 of the Act imposes a federal unemployment tax, but Section 3302 of the Act permits tax credits against the federal tax to employers who have paid money into federally approved state unemployment tax funds. In order for a state to participate in the federal plan, it must meet certain requirements set

out under Sections 3303 and 3304. While the Petitioners are exempted from the Federal Unemployment Tax by Section 3306(c)(8), Sections 3304(a)(6) and 3309 require participating states to tax certain charitable organizations exempted from the federal tax. However, subsection (b) of Section 3309 provides that state unemployment taxes shall not apply to services performed

> (1) in the employ of (A) a church or convention or association of churches, or (B) organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches.

In April of 1978, the Secretary of Labor charged with administering FUTA was called upon to determine whether church-related schools were exempted from state unemployment tax under Section 3309(b)(1). The Secretary's opinion, announced in a letter of April 18, 1978, addressed to the Most Reverend Thomas C. Kelly, General Secretary of United States Catholic Conference, declared:

> The repeal by Congress of the exclusion, in section 3309(b)(3) of the Federal Unemployment Tax Act, of employees of elementary and secondary schools was clearly intended to result in State coverage of church-related schools, whose employees constitute over 80% of the employees of all nonprofit schools. In light of the repeal of 3309(b)(3), we think the only services performed in the schools that may reasonably be considered within the scope of the exclusion permitted by 3309(b)(1) are those strictly church duties performed by church employees pursuant to their religious responsibilities within the school.

The secretary's opinion resulted in a directive issued to all state employment agencies participating in the federal unemployment program requiring state agencies to assess unemployment compensation taxes against church-related schools. Under this construction of the statute, all of Petitioners' employees who are employed by elementary and secondary school establishments are subject to mandatory state unemployment coverage (see 26 U.S.C. § 3304(a)). The election of extension of this coverage under state law is a mandatory condition precedent to certification by the Secretary of Labor that the state statutes conform to the federal standards; the Secretary's certification in turn provides access to the system of tax credits and federal reimbursement of certain benefit costs.

The State of South Dakota, in order to continue its participation in FUTA, proposes to collect an unemployment tax from the Petitioners' administrators of elementary and secondary parochial schools, for the benefit of parochial teachers employed by the Petitioners. The state statute under which South Dakota seeks to assess this tax is designed specifically to comply with federal demands for participating states. SDCL 61-1-10.4. Further, this section is identical to Section 3309(b)(1)(A) and (B) of the Federal Unemployment Tax Act.

The Petitioners take issue with the Secretary of Labor's interpretation of 26 U.S.C. § 3309 and its application to them through SDCL 61-1-10.4. The Petitioners contend that any action by the South Dakota Department of Labor to collect unemployment compensation taxes against them would violate their First Amendment right under the Religious clauses.

It is the State's position that as a result of the Unemployment Compensation Amendments of 1976

(PL 94-566), employees of *all* private, nonprofit elementary and secondary school establishments must be included in a state's coverage. Section 3309(b)(2) permits continued exclusion for the services performed by a duly ordained minister of a church in the exercise of his ministry. Employees who do not work for a church-related elementary or secondary school establishment, but who work directly in the church or for an essentially religious organization may remain within the scope of the Section 3309(b)(1) exclusion.

While the statute, on its face, gives little guidance concerning the interrelation between the repeal of the § 3309(b)(3), school exemption and the retention of the § 3309(b)(1) religious organization exemptions, its history and remedial purposes militate strongly in favor of construing the statute so as to include *all* elementary and secondary schools, such as those organized by the Petitioners within unemployment insurance coverage.

SUMMARY OF THE ARGUMENT

Since unemployment insurance was adopted in the 1930's, Congress has expanded the program to cover more and more employees. In interpreting the 1978 legislation on FUTA to cover employees of church schools, the Supreme Court of South Dakota followed the intent of Congress. The intent of Congress was that all secondary and elementary school employees be covered under FUTA when it revoked the exemptions for this area under 26 U.S.C. 3309(b)(3) in 1976, and that all services for educational institutions were to fall under the unemployment program. Taxes were to be paid for those employees by the employer, even if the employer was a church. In reaching its decision the Supreme Court of South Dakota not only followed the intent of Congress but the contemporaneous construction of the statute given the Department of Labor which was the agency charged with its administration.

The interpretation given to the statute by the Supreme Court of South Dakota does not violate the First Amendment religious clauses against either the establishment of a religion or a violation of the free Exercise of Religion. The Petitioner has failed to show what religious beliefs have been prohibited or burdened and has further failed to show any establishment of a religion in order to apply the excessive entanglement test of that clause. All contact between church and state is not prohibited by the Constitution and no excessive entanglement of any kind has been shown by the Petitioner in the application of the unemployment tax to church school employees, and therefore the Writ of Certiorari should not be issued.

ARGUMENT

I

THE UNEMPLOYMENT COMPENSATION AMENDMENTS OF 1976, REPRESENT THE CULMINATION OF CONGRESSIONAL EFFORTS TO PROVIDE VIRTUALLY UNIVERSAL UNEMPLOYMENT INSURANCE COVERAGE AND SHOULD BE CONSTRUED IN THAT LIGHT.

Congress has followed an unbroken path towards expansion of unemployment insurance coverage. This movement accelerated in the 1970's and culminated in the 1976 Amendments, which:

> provide coverage under the permanent Federal-State Unemployment Compensation law for substantially all of the nation's wage and salary earners. . . .

H.R. Rep. No. 755, 94th Cong. 1st Sess. 1 (1975).

This steady progress towards universal unemployment insurance coverage, together with the remedial nature of FUTA, trigger the application of several well-accepted rules of statutory construction including the requirement that a statute will be interpreted in light of the purposes it seeks to achieve and the evils it seeks to remedy. *Fasulo v. United States*, 272 U.S. 620 (1926), *Trinity Church v. United States*, 143 U.S. 457, 463 (1892). Statutes must be given effect in accordance with the purpose manifested by Congress. *Commissioner of Internal Revenue v. Bilder*, 169 U.S. 499 (1962). *United States v. Ohio*, 354 F.2d 549, 555 (6th Cir. 1966). This directive takes on particular significance in the context of the instant case:

> Remedial social legislation . . . is to be construed liberally in favor of the workers whom it was designed to protect.

Wirtz v. Ti Ti Peat Humus Co., 373 F.2d 209, 212 (4th Cir. 1967). See also *United States v. Silk*, 331 U.S. 704 (1947); *Phillips, Inc. v. Wallings*, 324 U.S. 490 (1945); *Israel-British Bank (London) Ltd. v. F.D.I.C.*, 536 F.2d 509, 513 (2nd Cir. 1976). Finally, the requirement that remedial legislation be broadly construed produces a correlative obligation that exemptions be narrowly applied:

> Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. *To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.*

Phillips, Inc. v. Wallings, 324 U.S. 460, 493 (1945) (Emphasis supplied.) See also *Arnold v. Ben Fancwsky Inc.*, 361 U.S. 388 (1960); *Hamblen v. Ware*, 526 F.2d 476, 477 (6th Cir. 1975). The Petitioners cannot demonstrate qualifications allowing[4] § 3309(b)(1) exemptions but, rather, a review of the relevant legislative history clearly manifests a congressional intention to extend

[4] Under an analogous remedial statute, the Fair Labor Standards Act, it has been held that exemptions:

> are to be narrowly construed against the employer *upon which the burden rests to show that it comes within the exemption. Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 394, 80 S.Ct. 453, 456, 457, 4 L.Ed.2d 393 (1960); *Mitchell v. Kentucky Finance Company*, 359 U.S. 290, 295, 79 S.Ct. 746, 759, 3 L.Ed.2d 815 (1959); *Yogurt Master, Inc. v. Goldbery*, 5 Cir., 1962, 310 F.2d 53, 55.

Schultz v. Louisiana Trailer Sales, Inc., 428 F.2d 61, 67 (5th Cir. 1970). (Emphasis supplied.) Compare *United States v. Silk*, 331 U.S. 704, 712 (1947) with *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 723 (1947).

coverage to all elementary and secondary schools regardless of whether they have religious affiliation or not.

II

CONGRESS INTENDED THE UNEMPLOYMENT COMPENSATION AMENDMENTS OF 1976 TO EXTEND UNEMPLOYMENT INSURANCE COVERAGE TO *ALL* ELEMENTARY AND SECONDARY SCHOOLS.

A brief review of the 1970 Amendments is necessary to properly understand the objective behind the 1976 Amendments.

The Employment Security Amendments of 1970, by adding new language in 26 U.S.C. §§ 3304(a)(6), 3306(c)(8), and 3309(a)(1)(A), required state law coverage of individuals employed by nonprofit organizations (including institutions of higher education). The legislative reports accompanying the amendments unmistakably show that Congress intended to bring individuals employed in nonprofit institutions of higher education, including religious organizations, under program coverage. Thus the House Ways and Means Committee explained that:

> Under existing Federal law, services performed for nonprofit *religious, charitable, educational* and humane organizations for a State and its political subdivisions are exempt from the tax provisions of the Federal Unemployment Tax Act. While employment in these organizations and governments is not subject to fluctuations to the same degree as in commerce and industry, unemployment affects a substantial number of their employees, particularly people working in nonprofessional occupations.

> Your committee does not want to change the present tax status of nonprofit organizations, but it is concerned about the need of their employees for protection against wage loss resulting from unemployment.
>
> H.R. Rep. No. 612, 91st Cong., 1st Sess. 11 (1969). (Emphasis supplied.)

In fact, Congress, quite explicitly delineated the limits of the § 3309(b)(1) exemption as applied to institutions of higher education.

> The paragraph excludes services of persons where the employer is a church or convention or association of churches, but does not exclude certain services performed for an organization which may be religious in orientation unless it is operated primarily for religious purposes and is operated, supervised, controlled, or principally supported by a church or (convention of churches). *Thus, the services of the janitor of a church would be excluded but services of a janitor for a separately incorporated college, although it may be church related, would be covered.*[5]
>
> A college devoted primarily to preparing students for the ministry would be exempt, as would a novitiate or a house of study training candidates to become members of religious orders. On the other hand, a church-related (separately incorporated) charitable organization (such as, for example, an orphanage or a home for the aged) would not be considered under this paragraph to be operated primarily for religious purposes.

[5] Accordingly, the legislative history recognized the principle involved in cases decided under the Fair Labor Standards Act that exemptions are limited to employees of those *establishments* "clearly and unmistakably" within their terms. *Arnold v. Ben Kanowsky*, 361 U.S. 388, 392 (1960). See 29 C.F.R. §§ 779. 302-311, and compare *Mitchell v. Kroger Co.*, 248 F.2d 935, 940 (8th Cir. 1959).

H.R. Rep. No. 612, 91st Cong., 1st Sess. 44 (1969) (Emphasis supplied.) Identical language is found in S. Rep. No. 752, 91st Cong. 2nd Sess. (1970) at 48-59. Thus, Congress clearly expected in § 3309(b)(1)(b) be narrowly construed at least as applied to educational institutions. The Department of Labor has followed the congressional mandate and consistently interpreted the 1970 Amendments as requiring state unemployment insurance coverage of all institutions of higher education except for the narrow category including seminaries and novitiates.[6]

In light of Congress' apparent intention in 1970, to bring religiously affiliated colleges and universities within coverage, and in the fact of the Department's subsequent adoption of this interpretation, Congress' description, in 1976, of the objective behind the repeal of § 3309(b)(3) is informative:

> Section 115(b) also has the effect of requiring the state to pay unemployment compensation on the basis of *services performed for all educational institutions*. Under existing law, the state is only required to provide coverage of services performed for institutions of higher education.

H.R. Rep. No. 755, 94th Cong., 1st Sess. § 6 (1975). (Emphasis supplied.)

> *Employees of the nonprofit elementary and secondary schools.* The bill would require the state to extend the coverage of their unemployment compensation programs to employees of nonprofit ele-

[6] In the summer of 1970, the Department published a document for the use of the states entitled, *Draft legislation to Implement the Employment Security Amendments of 1970...* H.R. 14705. The purpose of the volume was to suggest to the States the areas in which State unemployment compensation laws would have to be amended to remain in conformity with the 1970 Amendments. The Department's directives in the area of coverage of institutions of higher education is substantially a restatement of the language in the House and Senate Reports quoted above.

> mentary and secondary schools (present law requires coverage for employees of institutions of higher education). The provisions for non-payment of benefits during vacation periods to school employees of state and local governments would also apply to employees of nonprofit schools.
>
> The states would not be required to provide the new coverage until January 1, 1978.
>
> S. Rep. No. 1265, 94th Cong. 2nd Sess. 2 (1976).

Any lingering doubt concerning Congress' desire to extend coverage to *all* elementary and secondary schools is satisfied by reference to the statistical data cited by Congress regarding the effect of the 1976 Amendments. The Senate Report, S. Rep. No. 1265, 94th Cong., 2nd Sess. 8 (1976), estimated the number of new employees who would be covered as a result of the repeal of § 3309(b)(3) at 242,000. This figure approximates the total number of teachers in *all* nonprofit elementary and secondary schools. Without the inclusion of employees of church-related elementary and secondary schools, the figure would have been substantially less than 242,000 because the staff of church-related elementary and secondary schools comprise more than half of the staff of all nonpublic elementary and secondary schools in the United States.[7]

Thus, in setting forth the projected impact of the repeal of § 3309(b)(3), Congress could only have contemplated that the repeal of § 3309(b)(3) would bring all elementary and secondary schools within FUTA. Considering the total absence of any indication that

[7] According to the Census Bureau's *Statistical Abstract of the United States* (1977 ed.) there were 261,000 full-time teachers in nonprofit elementary and secondary schools in 1975 of which 150,000 were in Roman Catholic schools. PP. 145, 147, tables 235, 237.

Congress intended an alternative interpretation and noting, particularly, the necessity that the exemptions to coverage be construed narrowly, the defendants' construction of the Act is virtually mandatory.

III

THE COURT SHOULD DEFER TO THE CONTEMPORANEOUS CONSTRUCTION OF THE STATUTE GIVEN BY THE AGENCY CHARGED WITH ITS ADMINISTRATION.

The importance of contemporaneous agency interpretation as a tool of statutory construction is well recognized:

> When faced with a problem of statutory construction, this court shows great deference to the interpretation given the statute by the administration. . . . Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried or new.'

Udall v. Tallman, 380 U.S. 1, 16 (1965) quoting *Unemployment Commission v. Aragon*, 329 U.S. 143, 153 (1946). This principle has been recognized, generally, by the Courts of Appeals, *Wald Manufacturing Company v. N.L.R.B.*, 426 F.2d 1328 (6th Cir. 1970); *City of Tullahoma v. Coffee County Tennessee*, 328 F.2d 683 (6th Cir. 1964) and has been particularly noted with respect to the responsibilities of the Department of Labor, *American Fed. of State Cty. & M. Employees v. City of Cleveland*, 484 F.2d 338 (6th Cir. 1973).

Within months of the enactment of the Unemploy-

ment Compensation Amendments of 1970, the Department published its interpretation of those amendments which stated, *inter alia*, that the § 3309(b)(1) exemption for services performed for churches or religious organizations did not extend to services performed at religiously affiliated institutions of higher education. The position has been consistently maintained. The Department's view of the objective behind the 1976 Amendments represents a logical and necessary extension of the position which the Department has taken, without apparent objection, since 1970. The instant case presents more than the normal case for deference to an agency's statutory interpretation in view of congressional action, or more correctly inaction, in 1976 with respect to the Department's interpretation of § 3309(b)(1).

> The administrative interpretation, as evidenced by the applicable Rules of the Bureau of Immigration adopted in 1917 and carried forward in later regulations, has been uniform to the effect that no time limitation is applicable in a case like the present. *The failure of Congress to alter or amend the section, notwithstanding this consistent construction by the department charged with its enforcement, creates a presumption in favor of the administrative interpretation, to which we should give great weight, even if we doubted the correctness of the ruling of the Department of Labor.*

Costanzo v. Tillinghast, 287 U.S. 341, 345 (1932) (emphasis supplied), cited in *City of Tullahoma v. Coffee County Tennessee*, 328 F.2d 683, 691 (6th Cir. 1964). See *N.L.R.B. v. Bell Aerospace Co. Division of Textron, Inc.*, 416 U.S. 267, 278 (1974). The court should evaluate the statutory scheme both in light of Congress' apparent ratification of the Department of

Labor's interpretation of the 1970 Act, when enacting the 1976 Amendments, and the Department's contemporaneous construction of those Amendments.

IV

THE SECRETARY'S INTERPRETATION OF 26 U.S.C. § 3309 AND ITS APPLICATION THROUGH SDCL 61-1-10.4 DOES NOT VIOLATE THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

The Religion Clauses of the First Amendment of the United States Constitution, which provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," are aimed at preserving governmental neutrality in matters pertaining to religion while securing religious liberty to the individual. The Religion Clauses, as they are known, are of two parts, Establishment and Free Exercise. Although the two clauses thus serve a common purpose, and overlap, "they forbid two different kinds of governmental encroachment upon religious freedom." *Engel v. Vitale*, 370 U.S. 421, 430 (1962). See also *Abington School District v. Schempp*, 374 U.S. 203, 211 (1963). This is the second case before this Court where a church claims a violation of its rights under the free exercise clause. *Mitchell v. Pilgrim Holiness Church*, 210 F.2d 879 (1954 7th Cir.).

In order to demonstrate that legislation is in conflict with the Free Exercise Clause, "it is necessary . . . for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *Abington School District v. Schempp*, 374 U.S. at 223. Coercion alone, however, is insufficient to sustain a free exercise claim. Although the clause's protection of

religious beliefs is absolute, religiously based conduct "remains subject to regulation for the protection of society." *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940). Thus, even governmental regulations that inhibit conduct mandated by religious convictions, if justified by "interest of the highest order and those not otherwise served[,] can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). The Petitioners' first amendment challenge to the Act fails to meet either of these criteria.

A. *Equal coverage of parochial school employees under the federal-state unemployment compensation program would not have a sufficiently coercive effect on Plaintiffs as to violate their first amendment rights.*

The Supreme Court has frequently recognized that "a violation of the Free Exercise Clause is predicated on coercion" and that, therefore, "it is necessary . . .for for one to show the coercive effect of the enactment as it operates against him in the practice of religion." *Abington School District v. Schempp*, 374 U.S. at 223. In order to enjoy immunity from otherwise valid governmental regulation, the very actions interdicted by the regulation "must be rooted in religious belief." *Wisconsin v. Yoder*, 406 U.S. at 215. The statute before the court in this case does not make criminal the holding of any religious belief or opinion, nor does it force anyone to embrace any religious belief or to say or believe anything in conflict with his religious tenents and therefore as in *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) the unemployment statute is not a violation of the First Amendment rights of the Petitioners.

The Petitioners have not pointed to any *specific* religious beliefs or practices that conflict with inclusion of employees in its school under the Federal-State Unemployment Compensation Program. Assumingthat Petitioners' claim relates to the alleged financial burden of FUTA, Petitioner fails to meet the burden of demonstrating a violation of the Free Exercise Clause. The court has refused to invalidate laws on free exercise grounds merely because they "make the practice of . . . religious beliefs more expensive," an effect which may, concededly, result from the Secretary's interpretation. *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961) (rejecting a challenge to Sunday closing laws by Orthodox Jewish merchants), *Mitchell v. Pilgrim Holiness Church Corp., supra*, (churches engaging in interstate commerce must pay minimum wage). This court noted in *Murdock v. Pennsylvania*, 319 U.S. 105, 114 (1942):

> We do not mean to say the religious groups and the press are free from all financial burdens of government. We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities. It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon.

This case, is therefore, unlike the challenge brought by the parents of Amish children to Wisconsin's compulsory school attendance law. The Court's decision in that case was based on the fact that any compulsion would force the Amish to change their entire "way of life." *Wisconsin v. Yoder*, 406 U.S. at 221. The Court

feared that recognition of the state's claim would "call into question traditional concepts of parental control over the religious upbringing and education of their minor children." *Id.* at 231. No such claims can be made with respect to the effect of unemployment compensation coverage of parochial elementary and secondary school employees. It is hard to visualize any change in the "way of life" that would be produced by the unemployment insurance coverage, much less a change of the magnitude that was caused by the compulsory school attendance law in *Yoder*.

Any characterization of the South Dakota Unemployment Compensation Act as "coercive" is further weakened by the fact that the Petitioners may elect the reimbursement method to meet its obligations under the state unemployment compensation law. Employers electing the reimbursement method make payments in lieu of contributions into the state unemployment compensation fund. An employer electing the reimbursement method is liable only for those amounts paid out to the employer's former employees in the form of benefits. Such benefits are not automatically paid to all individuals who become unemployed. Rather, the filing of a claim and the meeting of eligibility requirements are conditions precedent for the receipt of benefits and resulting liability of an employer. Hence, unless and until a claim is made by an eligible employee, Petitioners electing the reimbursement method will not be required to pay any amount into the state's unemployment fund. Coverage does not automatically result in the levy of a flat tax on these employers. Such a statutory scheme, wherein it is conceivable that no liability may occur, can hardly be characterized as "coercive," and it will have little, if any, impact upon plaintiff's religious practices.

B. *Coverage of parochial school employees under the federal-state unemployment compensation program is justified by a compelling governmental interest.*

Coverage of parochial school employees by the South Dakota Unemployment Compensation Act is permissible because it is justified by a compelling governmental interest. This interest is to provide a system of income maintenance for employees who find themselves without employment so that they have the resources for food, shelter, and other necessities until they are able to secure another job or until the expiration of the statutorily prescribed period for receipt of benefits. The 1976 Amendments furthered this remedial purpose of extending coverage, under the Federal-State Unemployment Compensation program, to employees of nonprofit elementary and secondary schools. H.R. Rep. No. 94-755, 94th Cong., 1st Sess. 1 (1975). Congress determined these amendments were needed, in part to avoid further spreading of the ripple effects of unemployment throughout the national economy.[8]

These legislative objectives must be evaluated in light of the following principles. First the government may not prohibit or burden religious beliefs, however, "freedom to act, even when the action is in accord with one's religious convictions," may be reasonably

[8] Congressional authority to enact the Unemployment Compensation Amendments of 1976 derives from its authority to "lay and collect taxes, duties, imports, and excises, to pay the debts and provide for the common defense and general welfare of the United States." U.S. Const. Art. 1, § 8(1). The congressional power to implement the unemployment compensation program has been consistently upheld on the basis of this constitutional grant. *Steward Machine v. Davis*, 301 U.S. 548 (1937); *Carmichael v. Southern Coal*, 301 U.S. 495 (1937). See also *Oklahoma v. Civil Service Commission*, 330 U.S. 127 (1946) (holding that Congress has great latitude in fixing the terms upon which its money allotments and tax credits may be conditioned.

restricted by neutral legislation. *Braunfeld v. Brown*, 366 U.S. 599, 603. See *McDaniel v. Paty*, 98 S.Ct. 1322, 1329, n.8 (1978); *Reynolds v. United States*, 98 U.S. 145, 166 (1879). Second, governmental regulations that inhibit conduct mandated by religious beliefs, if justified by "interests of the highest order and those not otherwise served, can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. at 215. See *Sherbert v. Verner*,[9] 374 U.S. 398, 403 (1963). Application of these principles demonstrates that the Secretary's interpretation of the 1976 Amendments does not violate the Free Exercise Clause of the first amendment.

The courts have repeatedly upheld social and regulatory programs which further an important governmental interest even though such programs may have an incidental effect upon the free exercise of religion. Almost 100 years ago, the Supreme Court upheld the polygamy conviction of a Mormon who claimed that his religion required him to engage in that practice. *Reynolds v. United States*, 98 U.S. 145 (1879). The Court explained that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order." *Id.* at 164. The

[9] In *Sherbert*, the Court held that the State's denial of unemployment compensation to a Seventh Day Adventist who refused to work on Saturday violated the Free Exercise Clause. *Sherbert* differs in two significant respects from this case. First, in *Sherbert*, there was a much more direct burden placed upon individual's religious practices. The applicant was forced "to choose between following the precepts of her religion and forfeiting benefits, on the one hand and abandoning the precepts of her religion in order to accept work, on the other hand." 374 U.S. at 405. Second, the State's asserted interest in preventing the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work was not sufficiently compelling so as to justify the burden placed on the plaintiff. *Id.* at 407. This interest is significantly less important than those of which would result from unemployment compensation coverage of parochial school employees, i.e., assisting individuals during periods of unemployment and averting the detrimental impact of such unemployment upon the national economy.

Supreme Court has also upheld a governmental system of compulsory vaccinations, despite objections, on a religious basis. *Jacobson v. Massachusetts*, 321 U.S. 158 (1944). More recently, the Supreme Court upheld Sunday closing laws over the objections of individuals whose religious practices required them to close their businesses on Saturday. *Braunfeld v. Brown*, 366 U.S. 599 (1961). Chief Justice Warren's plurality opinion in *Braunfeld* observed that the impact of the law on those challenging it "may well result in some financial sacrifice in order to observe their religious beliefs, still the option is wholly different than when the legislation attempts to make a religious practice itself unlawful." The opinion further concluded:

> To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature.
>
> *Id.* at 606.

Neutral legislation indirectly impinging on the right to act upon religious convictions has been upheld by lower Federal courts in a wide variety of situations where the governmental interest in promoting social and economic objectives has been deemed paramount. For example, Federal Communications Commission regulations requiring enforcement of antibias regulations with respect to job positions were unsuccessfully challenged by a licensee owned by a religious organization. *King's Garden, Inc. v. Federal Communications Commission*, 498 F.2d 51 (D.C. Cir.), certiorari denied, 419 U.S. 996 (1974). Another court held that a limitation of wheat production imposed by the Agricultural

Adjustment Act of 1938 did not violate an individual's right of religious freedom although it was against his religious principles to limit his farm production. *United States v. Kissinger*, 250 F.2d 940 (3rd Cir.), certiorari denied, 356 U.S. 958 (1958).

Of even more relevance are a number of cases which have held that the failure to grant tax exemptions to religious organizations did not violate the free exercise clause. *Watchtower Bible and Tract Soc. v. Los Angeles County*, 181 F.2d 739 (9th Cir.), certiorari denied, 340 U.S. 820 (1950) (state personal property tax levy upon religious literature); *Parker v. Commissioner of Internal Revenue*, 365 F.2d 792 (5th Cir. 1966), certiorari denied, 385 U.S. 1026 (1967) (a foundation pursuing a substantially nonexempt purpose in the publication and commercial exploitation of the writings of the director of the foundation was not entitled to a tax exemption as a religious organization under the federal Internal Revenue Code). The court in *Parker* observed:

> The receiving of an exemption is thus a matter of legislative grace and not a constitutional right. As long as exemptions are denied by the Commissioner on a non-discriminatory basis using specific and reasonable guidelines and without inquiry into the merits of the particular religious doctrines, the withholding of religious exemptions is permissible under the Constitution.

Id. at 795. The Secretary's interpretation of Section 3309(b) is not contrary to the Free Exercise clause. The Secretary's interpretation scrupulously avoids any inquiry into the merits of particular religious doctrines and will result in the non-discriminatory enforcement

as applied to all nonprofit elementary and secondary schools.[10]

Another pertinent case in *Mitchell v. Pilgrim Holiness Church Corporation*, 210 F.2d 879 (7th Cir.) certiorari denied, 347 U.S. 1013 (1954). In this case, the court held that the refusal to comply with the federal minimum wage law could not be justified on religious grounds. The court first determined that the Fair Labor Standards Act did not significantly impinge upon the free exercise of religion so as to constitute a violation of the First Amendment. In a description that is equally applicable to the Secretary's interpretation of the Federal Unemployment Tax Act, the court stated that the Fair Labor Standards Act "does not in this case *prohibit* the free exercise of religion by the defendant nor does it *lay a flat tax* on the privilege" (emphasis in original). 210 F.2d at 883. The court then concluded that the remedial nature of the Fair Labor Standards Act—"to insure to the workers of the

[10] The Court referred to the argument that the failure to tax a religious institution may constitute a violation of the Establishment Clause of the First Amendment. An individual or institution which receives a tax exemption on the basis of religious criteria is receiving a form of indirect aid in the sense that resources which would otherwise be used for payment of the tax are now available for the financing of other, presumably religious activities.

This argument retains vitality notwithstanding the Supreme Court's decision in *Waltz v. Tax Commissioner of New York*, 397 U.S. 644 (1970). In *Waltz*, the Court refused to prevent the New York City Tax Commission from granting property tax exemptions to religious organizations for properties used solely for religious worship. The Court's opinion in *Waltz* was careful to point out that the statutory scheme contained two significant features. First, the exemption did not single out one particular church or religious group or even churches as such. Rather, it was part of an exemption available to "a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups." *Id.* at 673. Second, the exemption was limited to religious properties used solely for religious purposes. *Id.* at 666.

These limitations of the *Waltz* holding can be used to evaluate the petitioner's interpretation of the 1976 Amendments. A broad reading of 26 U.S.C. § 3309(b)(1) to include employees of parochial elementary and secondary schools would single out churches for favored treatment. Nor would it be limited, as was the scheme in *Waltz*, to religious properties used solely for religious purposes, since it would include employees performing secular functions. Plaintiff's reading of § 3309 would, therefore, raise serious Establishment Clause problems.

United States engaged in the production of goods for commerce a minimum wage sufficient to maintain a minimum standard of living"—justified any incidental impact upon their employer's free exercise of religion. *Id.* at 884.

These cases establish that coverage of parochial school employees, along with all other elementary and secondary school employees, under the Federal-State Unemployment Compensation Program would not contravene the First Amendment. Universal coverage will not have any more than a minimal impact on any religious practice or belief. Furthermore, the remedial purposes of the unemployment compensation program to insure that eligible persons will be able to maintain a minimum standard of living during periods of unemployment will not have a ripple effect on the national economy—are sufficiently compelling to override any incidental burden on the free exercise of religion.

The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs*, as such, *Cantwell v. Connecticut*, 310 U.S. 296. Government may neither compel affirmation of a repugnant belief, *Torcaso v. Watkins*, 367 U.S. 488; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, *Fowler v. Rhode Island*, 345 U.S. 67; nor employ the taxing power to inhibit the dissemination of particular religious views, *Murdock v. Pennsylvania*, 319 U.S. 105.

When St. Martin's closed its doors in 1979, it was not the male minister teachers of the church, nor the female teachers, who became unemployed. The people effected were the two cooks and the janitor who had no income nor resources. This class of employees and the

deprivations they face when unemployed; caused Congress to pass social legislation to protect them.

> Nor is there any intimation that the minimum standard of living as fixed by the Act is not just as necessary to the health and well-being of the defendant's employees as it is to the health and well-being of the employees of any other printing establishment. *Mitchell v. Pilgrim Holiness Church Corp.* 210 F.2d 879, 884.

The legislative purpose is neither the advancement nor the inhibition of religion. The advancement of a social purpose for the benefit of all workers, that places no burden on the belief of the Petitioner is the goal of the legislation. While the Petitioners claim that the excessive entanglement standard of the establishment cases should be applied to the Free Exercise Clause, they fail to state what religious practice will be burdened or inhibited by the payment of the unemployment tax.

> To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature. *Braunfeld v. Brown*, 366 U.S. 599, 6 L.Ed.2d 563, 568.

In *Walz v. Tax Commission, supra*, the court found that the purpose of tax exemptions for churches and other nonprofit organizations was neither the advancement nor the inhibitition of religion. In this case the purpose of the law is neither the advancement nor the inhibition of religion, but the achievement of a social goal which is within the constitutional power of the Congress and the legislature of South Dakota to attain.

The grants of tax exemption in *Walz* dealt with the historical exemption of church from property taxes, and the latent dangers inherent in those taxes. The court did not rule out all taxes on churches or their activities. As the court noted, either course, taxation or exemption, occasions some degree of involvement with religion.

V

THE IMPOSITION OF THE UNEMPLOYMENT COMPENSATION TAX DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT NOR ENTANGLE THE STATE IN CHURCH AFFAIRS.

Petitioners contend that the decision of the Referee fosters excessive entanglement by the State contrary to the religion clauses of the First Amendment. The claim is without merit. Excessive entanglement is part of a three-prong test which this court has applied to determine if the establishment clause of the first amendment has been breached. To raise this issue of entanglement, usually the petitioner to the court has claimed that some religion has been established. The Petitioners in this case wish to raise the entanglement issue and at the same time, not claim establishment of religion by letting them avoid a tax that all other private schools have to pay. See *Everson v. Board of Education*, 330 U.S. 1, (1947) (bus transportation); *State v. Cathedral Academy*, 434 U.S. 125 (1977) (record keeping and testing services); *Lemon v. Kurtzman*, 403 U.S. at 614, (1971) (salary supplements to teachers); *Hunt v. McNair*, 413 U.S. 734 (revenue bonds for school

buildings); *Wolman v. Walter*, 433 U.S. 229 (1977) (schoolbooks).[11]

Constitutional law does not prohibit all contact or involvement between church and state, only excessive entanglement. *Lemon v. Kurtzman, supra.* While it is true that the inclusion of certain employees under the State's unemployment insurance law will necessarily call for increased involvement between the State and parochial primary and secondary schools, such involvement does not constitute excessive entanglement repugnant to the religion clauses of the First Amendment. This unmistakable conclusion is reached by an examination of the cases defining the sometimes elusive borders defining the permissible contact between the two institutions.

The First Amendment providing that "Congress shall make no laws respecting an establishment of religion as prohibiting the free exercise thereof" was intended to erect a high, impregnable wall between church and state. *Everson v. Board, supra.* However, no perfect or absolute separation is possible, *Waltz v. Tax Commissioner of New York*, 397 U.S. 664 (1970) says the Court in *Committee for Public Education v. Nyquist*, 412 U.S. 756 (1973):

> . . . despite Madisons admonition and the sweep of the absolute prohibition of the clause—this nation's history has not been one of entirely sanitized separation between church and state. It has never been though either possible or desirable to enforce a regime of total separation, and as a consequence cases arising under these clauses

[11] The tax exempt real estate of religious bodies in the United States is worth over $150 billion. In 1978 religious organizations and causes received $18.4 billion in money. Charity U.S.A. by Carl Bakal, p. 10, 11, 1979 Times Book Publisher.

> have presented some of the most perplexing questions to come before this Court.
>
> Thus the high wall of separation in modern interpretation has become 'a blurred indestinct and variable barrier depending on all the circumstances of particular relationship.' *Lemon v. Kurtzman*, 403 U.S. at 614, 29 L.Ed.2d 745, 91 S.Ct. 2105 (1971).

Petitioners claim that removal of the exemption would foster excessive entanglement between church and state in three situations applicable to this case. The first situation invisaged by the Petitioners is the State's determination of whether an employee is laid off or fired. The second situation troubling to the Petitioners involves the determination of the amount of time spent by employees working at both church and school. Lastly, Petitioners claim that the state has already become excessively entangled with the church since the Appeals Referee made findings of fact relating to the church and its relationship to the school. None of these situations present entanglements of constitutional proportions as is evidenced by examination of representative cases delineating acceptable involvement and excessive entanglement between church and state.

Everson v. Board of Education, 330 U.S. 1, 91 L.Ed. 711, 67 S.Ct. 504, 168 A.L.R. 1392, reh. den. 330 U.S. 855, 91 L.Ed. 1297, 67 S.Ct. 962 (1947) is the first modern case defining the establishment clause. The court sustained a New Jersey program that provided reimbursement to parents of money expended by them for the bus transportation of their children including parents of children attending parochial schools were also reimbursed. The court held that the establishment means that:

> Neither a state nor the Federal Government can set up a church. Neither can they pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can they force nor influence a person to go or remain away from church against his will, or force him to profess a belief in any religion.
>
> That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers, it does not require the state to be the adversary. State power is no more to be used so as to handicap religions, than it is to favor them.

The court held that the program provides help to parents to get their children, regardless of religion, safely to and from school.

In *Waltz v. Tax Commissioner, supra*, a taxpayer brought suit to enjoin the New York City Tax Commission from granting property tax exemptions to religious organizations for religious properties used solely for religious worship. The court held that the exemptions were not violative of the religion clauses since exemptions were granted to all houses of worship within a broad class of property owned by nonprofit, quasi-public corporations which included libraries, playgrounds, and thus did not single out religious organizations for special treatment. Further, the court held that the exemptions created minimal and remote contacts to a lesser degree than would be required by tax valuation.

In *Lemon v. Kurtzman, supra*, the Court struck down statutes of Rhode Island and Pennsylvania as violative of the religion clauses of the First Amendment. The Pennsylvania statutes provided state reim-

bursement of non-public elementary and secondary schools for the cost of teacher's salaries, text books and instructional materials. Under the Pennsylvania statute, participating schools were required to identify the cost of secular educational service by prescribed accounting procedures. The accounts were subject to state audit. Reimbursement was limited to courses presented in the public schools. The Rhode Island statute provided payment of up to fifteen percent annual salary supplements to teachers of secular subjects in non-public elementary schools. The teachers were required to teach only subjects taught in public schools, using materials used in public schools. The teachers were required to give a written agreement not to teach a course in religion while receiving salary supplements. The courts held that the statutes fostered excessive entanglement since comprehensive and continuing state surveillance would be required to insure that the restrictions as to the secular instruction were obeyed. Further, that the state's examination of the school's financial records to determine which expenditures were religious and which were secular would involve danger of excessive entanglement between church and state. Further, that continuing annual appropriations required under the statute would intensify political fragmentation and divisiveness on religious lines.

In *Tilton v. Richardson*, 403 U.S. 672, *reh. denied*, 404 U.S. 874 (1971), 120 taxpayers in Connecticut challenged the constitutionality, under the establishment clause, a federal statute which authorized aid in the form of construction grants for buildings and facilities to be used for secular educational purposes to colleges including private, religiously affiliated colleges. The

grant prohibited use of the funds for sectarian instructions and worship as in connection with the program of a divinity school or department. The Government retained only a twenty-year interest in the facilities and the prohibitions were enforced by on-site inspections. While striking down the twenty-year limitation on the government's involvement, the court upheld the program finding that the statute reflected a legitimate secular objective of assisting in providing facilities for higher education. This Court further found that the government's administration did not foster excessive entanglement even though the buildings were subject to government inspections.

More recently, the court in *Wolman v. Walter*, 433 U.S. 229 (1977), upheld provisions of an Ohio statute authorizing expenditures of public funds to provide, inter alia, speech, hearing and psychological diagnostic services (available to public school children) to parochial students while striking down, as violative of the establishment clause provisions, that authorized expenditures for, inter alia, secular instructional materials such as tape recorders, maps and globes.

Thus, a consistent pattern emerges. The Constitution will not tolerate those programs *that require constant surveillance or supervision of the states to police its provisions and that single out churches or church-related schools for preferential treatment.*

As to the first situation the State admits that different benefits accrue in the program to those employees that are laid off and those that are fired. However, this does not mean that the State is going to jump into the middle of sculptural disputes between church and teacher. This case presents a unique situation in that

none of the teachers are under contract. Instead they receive a "call" from the church. There are only two ways that a teacher may be released from the call. One is by teaching false doctrine and the second by misconduct as is outlined by the call and ordination installation. In both instances the rules are regulated by internal doctrinal matters controlled by the church. The State therefore needs only to determine whether the employee was fired or laid off. The employee will, as before, be left to the mercy of his/her churches firing practices.

The Respondents place undue reliance on the case of *Catholic Bishop of Chicago v. National Labor Relations Board*, 559 F.2d 1112 (7th Cir. 1977). In that case the NLRB sought to exercise jurisdiction over parochial schools.

In finding that NLRB coverage of parochial schools raised "serious constitutional question" (albeit without finding unconstitutionality) the Court expressed two concerns; one of which can be best described as involving the "chilling effect" of mandatory collective bargaining on the ability of clerical authorities to administer their schools and then relating to the potential problems created by requiring the Board to adjudicate employer/employee disputes in a sectarian school setting.

The majority of the Seventh Circuit was troubled by the requirement of negotiating "terms and conditions" of employment.

The Seventh Circuit opinion characterized the bargaining problem by suggesting that after collective bargaining, "No longer would the bishop be the sole repository of authority as required by Church law . . . the bishop has now to share 'some decision-

making' with the union." 599 F.2d at 1123. Unemployment insurance coverage does not create this kind of intrusion. Clearly unemployment insurance coverage does not necessitate state involvement in the development of curriculum, faculty standards, working conditions or any other aspect of school operations. In fact, the unemployment insurance system would generally only be triggered after an employee had been terminated and his or her connection with the school severed.

Obviously, the second area of the Court's concern regarding unfair labor practice adjudications does raise some possible parallels with certain aspects of the unemployment insurance system, but since these problems arise because of state law provisions and not because of FUTA, the proper inquiry must be at that level.

SDCL 61-1-13 and -14 provides for denial of benefits for certain time limits in cases where the applicant quit voluntarily without good cause or was discharged for misconduct in connection with the work. Since the "good cause" involved is the claimant's and not the school's there is no entanglement problem there. With respect to the discharges for misconduct, we presume that Petitioners' real concern is that the inquiry into what constitutes "misconduct" in connection with employment in Petitioners' schools is difficult to the point of unconstitutionality. This is not an inevitable result however. Taking one of the examples used in the circuit court in *Catholic Bishop*, 559 F.2d at 1125, involving a teacher discharged for teaching biology in a manner contrary to church doctrine, it seems likely that such an individual would be denied unemployment

benefits for misconduct without necessity of any inquiry into the correctness of church doctrines on the subject. But what if the State did attempt such an inquiry? Assuming, but not conceding, such an approach is unconstitutional, the school could challenge *that* action on first amendment grounds and such a question could be resolved. The point is simply this, potential entanglements cannot be used to negate any possible unemployment insurance coverage of church school employees since coverage does not *inevitably* create any entanglements. Unless the court is prepared to reject any coverage of Petitioners' schools on pure Free Exercise grounds, i.e., the "coercive" financial impact of unemployment insurance coverage, the Petitioners are entitled to no relief as to the State. Nothing in the State's interpretation of FUTA will create "entanglement."

The fact that the "entanglements" which apparently troubled the courts in *Catholic Bishop* are not necessarily present under unemployment insurance is not the only distinction between the two situations. The power of the NLRB to order reinstatement with back pay and to utilize judicial authority to enforce its ruling is certainly significant. The religious organization may, therefore, be faced with the dilemma of presenting a defense which might in some manner implicate the purely religious activities of the organization or being forced to re-employ an individual whom it deems unsatisfactory. No such dilemma exists under unemployment insurance because the church school employer always remains free to employ or not to employ any individual it chooses on whatever basis it desires. The only impact of unemployment insurance coverage is that some of these decisions will now have some financial impact, albeit an impact no greater than

that borne by private non-sectarian schools.[12] Yet there is no basis whatsoever for Petitioners' apparent belief that their employer/employee relations are constitutionally immune from such impact. Clearly, they can claim no exemption from child labor laws, *Prince v. Massachusetts*, 321 U.S. 158 (1944) or minimum wage requirements, *Mitchell v. Pilgrim Holiness Church Corporation*, 210 F.2d 879 (7th Cir.), cert. den., 347 U.S. 1013 (1954), and we assume that they acknowledge their obligation to maintain a safe workplace under OSHA or to provide for work-related injuries under the South Dakota Workmen's Compensation Act. What sets unemployment insurance apart? In the brief submitted by the Petitioners to this court, this one crucial question remains unanswered.

The right of individuals to send their children to religiously sponsored schools has been established for more than fifty years, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The State seeks no alteration in that principle. The Petitioners now demand a radical departure from precedent. The Petitioners now desire a previously unrecognized blanket immunity from any governmental control of their relation with their employees based upon their religious motivations. The State in no way seeks to question or examine Petitioners' motivations in establishing elementary or secondary schools or in following a particular method of instruction. The State's position is uncomplicated. Employees of *all* elementary and secondary schools are covered by FUTA. Where such school activities are performed, Section 3309(b)(1) is not available as an ex-

[12] The concept that the first amendment protects both the practice of religion and also spares one the financial burdens of such practice was rejected in *Braunfeld v. Brown*, 366 U.S. 599 (1961) where the Court concluded that a statute could not be invalidated on free exercise grounds merely because it made the practice of religion more expensive. 366 U.S. at 605.

emption to Petitioner. Coverage of elementary and secondary school activity, no matter what the motivation of the school administrators, was intended by Congress to protect former employees from the viscisitude of unemployment. To conclude otherwise would be to carve out a special rule based upon religious motivation which offends the First Amendment. That plea for special treatment should be rejected.

The second situation bothering the Petitioners involves the determination of the time spent by employees working at both church and school. Appellant cites as examples the janitor who may work in both the church and school buildings and the teacher who may sing in the church choir and teach Sunday School. Neither situation presents difficulties of constitutional proportions. Both of the churches and schools in the instant case are separate buildings. The situation presented here is not unlike the situation in which the churches pay an income tax on unrelated business income. See 26 U.S.C. § 512(b)(16). Such situations have never been held as constitutionally repugnant to the religion clause. *Gibbons v. District of Columbia*, 116 U.S. 404, 29 L.Ed. 680, 6 S.Ct. 427 (1886), also *Mitchell v. Pilgrim Holiness Church Corporation, supra*, liability of church for payment of minimum wage.

Finally the Petitioner contends that the State has already become excessively entangled with the church since the Appeals Referee made the following findings of fact:

> The object and purpose of the Synod, as set forth in its constitution, is to 'extend and conserve the true doctrine and practice of the Evangelical Lutheran Church.' One method of achieving this is

> by 'establishing and maintaining theological seminaries, colleges, academies, schools, and other institutions.'
>
> The Synod believes a theological basis exists for their schools. It holds the conviction that training of the youth involves both education and religion and that the two are so closely interwoven they can not be separated. They operate school programs in accordance with these beliefs.
>
> All education courses offered at the School are taught from a religious viewpoint based on the scriptural convictions held by members of the Wisconsin Evangelical Lutheran Synod.

The Appeals Referee then found "... that the primary purpose of the school is education and they are not exempt under this section." It is not improper for the State to find facts as to the nature of the religious school. The facts found by the referee echo findings in Supreme Court cases. In *Lemon v. Kurtzman*, 403 U.S. 602, the court states that the purpose of parochial schools is to inculcate religious values and belief and that "the parochial schools constituted an integral part of the religious mission of the Catholic church." 29 L.Ed. 747.

The Referee in this case made findings from uncontroverted evidence submitted to the tribunal. In making these findings and conclusions, the Appeals Referee is no more entangling itself with church matters than the Supreme Court is entangling itself with the churches in the various "parochade cases."

CONCLUSION

The Supreme Court of South Dakota has correctly interpreted SDCL 61-1-10.4 and 26 U.S.C. 3309 as it applies to Petitioners in this case. The South Dakota Court has followed congressional intent in interpreting this law and has also followed this court's rulings in applying the boundaries of First Amendment rights. Therefore the Respondents request that the request for the Writ of Certiorari be denied and the decision of the Supreme Court of South Dakota remain unaltered.

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NO. 80-120

In the Supreme Court of the United States

OCTOBER TERM, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH and NORTHWESTERN LUTHERAN ACADEMY,

Petitioners,

v.

THE STATE OF SOUTH DAKOTA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

REPLY BRIEF FOR THE PETITIONERS

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Respondent.

REPLY BRIEF FOR THE PETITIONERS

I. THERE IS NO EVIDENCE OF CONGRESSIONAL INTENT TO INCLUDE CHURCH ELEMENTARY AND SECONDARY SCHOOLS WITHIN THE PROVISIONS OF FUTA.

Both the State of South Dakota and the United States as amicus curiae desperately look for support in legislative history where no support exists, seeking to show that Congress must have intended to extend unemployment compensation law to churches that operate elementary

and secondary schools. However, their complicated interpretation of legislative history offers no support for their contentions.[1]

The purpose of the Unemployment Compensation Amendments of 1976 (Pub.L.No. 944-566) was to extend the unemployment compensation law primarily to three categories of employees: state and local government employees, agricultural workers and domestic workers. Nowhere in the legislative history or debates are churches or their schools mentioned. *See* H. Rep. No. 94-755, 94th Cong., 1st Sess. 3, 16 (1975).

The amicus curiae brief by the United States quotes isolated statements made by Rep. Corman and Rep. Ullman that appear in the Congressional Record. *See* 122 Cong. Rec. 22518-22519, 22892-22900 (1976). Rep. Ullman was speaking about expanding coverage to state and local workers, such as a cafeteria worker for a "city, county, or local school board." (Id., at 22519) Rep. Corman was also speaking about extending coverage to farm workers, domestic workers, and state and local employees. In fact, the statements attributed to Rep. Corman (Id., at 22819) were made *in opposition to an amendment to exclude those workers from coverage* under the proposed 1976 amendments. Rep. Corman gave specific examples — all of which pertained to governmental workers.

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[1] Legislative intent should not be an issue. Basic principles of statutory construction dictate that when the words of a statute are clear the plain language of the statute controls. Contrary to this well defined principle the South Dakota Supreme Court fails to determine the applicability of section 3309(b)(1)(A), stating that the threshold question before it involved congressional intent with respect to repeal of section 3309(b)(3). *See* Pet. Br. at 11; Amici Curiae Br. by Alabama and Nevada, at 7.

References are made to an isolated figure found in S. Rep. No. 94-1265, 94th Cong. 2d Sess. (1976) at 8. The Administrative Law Judge in the proceedings before the Department of Labor in *Alabama v. Marshall,* 626 F.2d 366 (5th Cir. 1980), (J.A. 18 at 31) rejected the Secretary of Labor's reliance on this figure, after hearing testimony on the development of this number stating:

> [T]he Department's reliance on a reference in the legislative history to the figure of 242,000 employees in all non-profit elementary and secondary schools as evidence of Congressional intent to cover employees of church schools is wholly misplaced. Department testimony in this case reflects that the figure is without meaning unless accompanied by the raw data, and admittedly, the record is silent as to Congressional understanding of the figure or the supporting data. In any event, a legislative cloak embracing integral church functions can hardly be woven with such a slender thread.

Legislative history leaves no doubt that Congress intended the employeees of churches that maintained schools to be exempt from unemployment compensation law. When Congress required the states to extend FUTA to non-profit organizations (Unemployment Security Amendments Act of 1970, Pub.L.No. 91-373, 84 Stat. 695), it established six separate exemptions. (26 U.S.C. § 3309(b) [1970]) The first of these, Sec. 3309 (b)(1), dealt with services *in the employ* of individual churches and their related organizations. Both the House and the Senate (in identical language) explained what was meant by its church and church organization language. H.R. Rep. No. 91-612, 91st Cong., 1st Sess. 44 (1969), and S.Rep. No. 91-752, 91st Cong., 2d Sess. 48-49 (1970). Both reports say:

> This paragraph excludes services of persons where *the employer* is a church or convention or association

> of churches, but does not exclude certain services performed for an organization which may be religious in orientation unless it is operated, supervised, controlled, or principally supported by a church (or convention or association of churches). [Emphasis added]

Congress was careful to use the *identical* language it had used in other parts of the Internal Revenue Code. (*See* Amicus Curiae Br. of the Lutheran Church-Missouri Synod at 4-9) Congress then explained its statutory language (H.R.Rep., *supra* and S.Rep., *supra*):

> Thus, the services of the janitor of a church would be excluded, but the services of a janitor for a *separately incorporated* college, although it may be church related, would be covered. A college devoted primarily to preparing students for the ministry would be exempt, as would be a novitiate or a house of study training candidates to become members of religious orders. On the other hand, a church related (*separately incorporated*) charitable organization (such as, for example, an orphanage or home for the aged) would not be considered to be operated primarily for religious purposes. [Emphasis added][2]

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[2] The State of South Dakota seeks to link church elementary and secondary schools with statements made by Congress relating to *separately* incorporated colleges (Resp. Br. at 15-16). The same error was made by the South Dakota Supreme Court (*See* Opinion, J.A. at 6-7). Both South Dakota and its Supreme Court fail to apply decisions by this court recognizing that the advancement of religion is not a substantial purpose of most church-affiliated colleges but is the primary purpose of church and secondary schools. *See* Tilton v. Richardson, 403 U.S. 672, 687 (1971); Roemer v. Board of Public Works, 426 U.S. 736, 755-58 (1976); Meek v. Pittenger, 421 U.S. 349, 366 (1975); *see also* Americans United for Separation of Church and State v. Bubb, 379 F. Supp. 872, 891 (D. Kan. 1974). Likewise, reliance on the general statement by the House Ways and Means Committee that it was concerned about the needs of employees of non-profit religious, charitable

It is submitted that Sec. 3309(b)(1) entirely contains whatever exemptions from FUTA are available to churches and their other separately incorporated organizations and that the 1976 elimination of the elementary and secondary school exemption that was contained in Sec. 3309(b)(3) of FUTA had no effect whatever on churches or their related organizations. (*See* Amicus Curiae Br. of United States Catholic Conference at 4-10)

Reference to the temporary Special Unemployment Assistance ("SUA") program established in 1974 (Pub.L. No. 93-567, 88 Stat. 1845) and its replacement by the 1976 FUTA amendments does not support any argument of Congressional intent. The SUA program was designed to provide additional assistance to those whose eligibility for unemployment compensation expired and all of those who were not previously covered under unemployment compensation law.[3] When Congress passed the 1976 amendments to FUTA, it left intact many of its exemptions under Sec. 3309(b). Obviously, Congress never intended universal coverage, and it simply cannot be argued now that the replacement of the all-inclusive SUA program by the limited 1976 FUTA amendments demonstrates an intent by Congress to subject employees of churches who operate schools to unemployment compensation law.

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and humane organizations is misplaced. (*See* Opinion, J.A. 6 and Pet. Br. at 14-15 (quoting H.R. Rep. No. 612, 91st Cong., 1st Sess. [1969]) The Committee's statement is of no assistance in interpreting exemptions actually enacted for certain types of non-profit employers, including religious organizations.

[3] *See* Sec. 202(b), 88 Stat. 1845, P.L. 93-567.

II. RESPONDENT SOUTH DAKOTA AND THE UNITED STATES AS AMICUS CURIAE DISREGARD THE PLAIN LANGUAGE OF SECTION 3309(b)(1)(A) OF FUTA.

The petitioner suggests that the starting point should be the language of the statute and not a wild excursion into possible Congressional intent (*See* Pet. Br. at 11; Amicus Curiae Br. of State of California at 8-11). Yet, South Dakota does not discuss Section 3309(b)(1)(A), which clearly exempts *all* employment by churches.[4] The United States, to support its discussion of Section 3309(b)(1)(A), seriously errs in stating as a fact that it is commonly perceived that church elementary and secondary schools are generally separately organized and recognized as separate legal entities. Exactly the opposite is the case as the United States well knows.

In *Alabama v. Marshall,* 626 F.2d 366, 370 (5th Cir. 1980), *pet. for cert. filed,* No. 80-922 (U.S. Dec. 8, 1980), holding services performed in church elementary and secondary schools are exempt services "in the employ of the church" under Section 3309(b)(1)(A) of FUTA, it was recognized that "many of the church schools have no separate legal existence from their church; the school employees are hired, controlled, disciplined, and fired

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[4] The State of South Dakota asserts that exemptions from remedial statutes must be narrowly construed, *"giving due regard to the plain meaning of statutory language and the intent of Congress,"* (Resp. Br. at 13) yet completely disregards the evident meaning of Sec. 3309(b)(1)(A) exempting in the employ of a church. *See* Caminetti v. United States, 242 U.S. 470, 485-86 (1917); 3 C. Sands, *Sutherland Statutory Construction,* § 60.01 (4th ed. 1974). In addition, even a "remedial" statute cannot be construed to apply to church schools in the absence of "the affirmative intention of Congress clearly expressed." NLRB v. Catholic Bishop, 440 U.S. 490, 500-01 (1979).

by church representatives and officials; school buildings are owned by the church; and, school employees are paid with funds drawn from the church accounts." This description by the court was based on stipulated facts agreed to by the United States (through the Department of Labor) regarding not only Lutheran elementary and secondary schools, but Baptist and Catholic as well. *See* Br. by the State of Alabama and Nevada as Amici Curiae at 8-9 and n. 15 and 16; ***and,*** Alabama Exhibit A at ¶¶ 21, 23-26, 38-41, 57, 65, 68-69 (Joint Appendix filed in ***Alabama v. Marshall, supra,*** lodged with this court in No. 80-922 [hereinafter "Ala./Nev. J.A."] at 51-53, 55-56, 60, 63-65; Nevada Exhibit A at ¶¶ 2-9, 27-29, 33-35 (Ala./Nev. J.A. at 93-95, 98-99)).

In addition, the Department of Labor directly stipulated in those proceedings that it did not dispute the Nevada Employment Security Department's factual determination that services in certain Catholic elementary and secondary schools were exempt from coverage under 26 U.S.C. § 3309(b)(1) "because they are performed in the employ of a church . . ." (Ala./Nev. J.A. at 109-110). As in the stipulated facts agreed to by the United States in ***Alabama v. Marshall, supra,*** the elementary school operated by St. Martin Evangelical Lutheran Church is not a separate legal entity, receives all of its financing from the church and is supervised by members of the church. (Pet. App. A38, ¶ XII). Likewise, Northwestern Lutheran Academy is not a separate legal entity from the Wisconsin Synod, and its support, operation and policy comes directly from the Synod. (Pet. App. A39, ¶ XV).

Notwithstanding, now the United States attempts to show that the word "church" should be used in a limited sense to be synonymous with an individual house of worship attempting to show that the exemption under Sec.

3309(b)(1)(A) is dependent upon the nature of the services performed and not who the employer is. As the Department of Labor's own Administrative Law Judge found in the *Alabama v. Marshall, supra,* conformity hearings (J.A. 31), "a construction of the language 'in the employ of a church' which looks to religious function and place of worship, rather than identification of the employing organization, plainly ignores the language employed by Congress not only in the statute itself, but also in its legislative history. . . ." Agreeing with the Administrative Law Judge, the Fifth Circuit said:

> We are convinced that the plain meaning of 'church' requires a definition as something qualitatively greater than the physical building of worship and, at a minimum, the term encompasses the legal entity commonly refered to as a church. The Secretary would avoid the legal consequences of this definition by excluding the very people which comprise a church as an entity and perform its functions. For this court to adopt such a limited definition would be for us to ignore the historic function of churches and defy the definition of the word as used in our vocabulary. (*Alabama v. Marshall, supra,* at 371)

In its brief the United States suggests that if the word "church" were defined to mean other than "an individual house of worship" employees of certain church schools would be exempt from FUTA while others would not be exempt depending solely upon whether they were separately incorporated. This completely overlooks the criterion Congress used in distinguishing services performed in the employ of a church under Section 3309(b)(1)(A) from services performed in the employ of a "separately incorporated" church related organization under Section

3309(b)(1)(B). (*See,* S.Rep. No. 91-752, *supra,* at 49; H.Rep. No. 91-612, *supra,* at 44).[5]

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[5] The brief by the United States contends that an interpretation of Section 3309(b)(1)(A) based on the legal identity of the employing organization would be wrong because under such an interpretation employees engaged in a profit-making business operated by a church would be exempt from coverage under FUTA although its business income would be taxable under 26 U.S.C. § 511. It should be noted that it would be extremely rare for churches to operate a "profit-making business" under the same corporate entity as the church because to do so would risk loss of its tax exempt status under 26 U.S.C. § 501(c)(3). However, even if the possibility contemplated by the United States would exist, it would not justify ignoring the plain language and legislative history of the statute. Basing the exemption on the legal identity of the employing orgainzation rather than the nature of the services is an easy test to apply and diminishes the risk of excessive entanglement with religion. *See* Walz v. Tax Commissioner, 397 U.S. 664, 698 (1970), which states that the more discriminating and complicated the basis of classification for an exemption the greater the risk of unconstitutional entanglement. (Harlan, J. concurring) Mistakenly relying on DeLaSalle Institute v. United States, 195 F. Supp. 891 (N.D. Cal. 1961) for support that "church" exemptions often are given a narrow meaning (U.S. Brief at 16), the United States fails to realize that the court held that the institute, which had a *separate corporate existence* from the church and operated a winery and schools was not a church for the purpose of exemption from the unrelated business income tax. *Id.,* at 893, 901. The court clearly did not rule that a church school with no separate legal identity from the church could not be considered part of the church. Indeed, in stating "[p]laintiff enjoys the advantages of separate incorporation under the civil law, and it must bear the disadvantages," the court suggested that had the institute not been separately incorporated the case might have had a different result. 195 F.Supp. at 901.

III. SERVICES PERFORMED IN CHURCH ELEMENTARY AND SECONDARY SCHOOLS ARE EXEMPT BECAUSE THEY ALSO ARE SERVICES IN THE EMPLOY OF AN ORGANIZATION OPERATED PRIMARILY FOR RELIGIOUS PURPOSES.

The United States makes the astonishingly bizarre statement that the existence of religious purposes in elementary and secondary schools was not intended by Congress to be grounds for exemption from FUTA but that colleges devoted to preparing students for the ministry would be covered by the exemption under Section 3309 (b) (1) (B). (U.S. Br. at 18-19) There simply is no support for any claim that legislative history shows that the only educational institutions that may be recognized as primarily religious under the provisions of Sec. 3309(b) (1) (B) are college seminaries, novitiates and "Sunday schools." (*See* Pet. Br. at 16-21 and 26-28; Amici Curiae Br. by Alabama and Nevada at 12-13 and 16-18; Amici Curiae Br. by Association of Christian Schools International, et al., at 4-7; Amici Curiae Br. of Germantown Friends School, et al., at 28-31).[6]

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[6] Church related organizations, such as orphanages or homes for the aged, obviously differ from church elementary and secondary schools. Orphanages and homes for the aged are established in furtherance of a religiously motivated purpose and are devoted primarily to physical care and maintenance, while church schools have as their primary purpose the inculcation of religious doctrine and belief into the overall school curriculum. (*See* Pet. App. A40, ¶ XIX) Walz v. Tax Commissioner, supra, at 671, recognized that schools are devoted "to assur[ing] future adherents to a particular faith by having control of their total education at an early age." It is interesting to note on facts similar to those in the record of this case that the United States expressly stipulated to the pervasive religious nature of church schools and to the factual

The effort by the United States to distinguish Supreme Court decisions acknowledging the pervasively religious nature and purpose of church schools is similarly futile. (*See* U.S. Br. at 17, n. 14) The cases in question involved church schools virtually identical to those in the instant case, and the Supreme Court's conclusions concerning those schools are applicable here. Moreover, almost all of the cases dealt with the same constitutional issue of entanglement raised in this case. *See* e.g., *NLRB v. Catholic Bishop,* 440 U.S. 490, 501-03 (1979); *Lemon v. Kurtzman,* 403 U.S. 602, 615-18 (1971).

We submit that both the brief by the Respondent and the brief by the United States misconstrue Sec. 3309(b)(1)(B) of FUTA, misinterpret legislative history and ignore facts and findings in the record showing the primary religious purpose of church elementary and secondary schools.

IV. THERE IS NO "AFFIRMATIVE INTENTION OF THE CONGRESS CLEARLY EXPRESSED" TO INCLUDE CHURCH ELEMENTARY AND SECONDARY SCHOOLS WITHIN UNEMPLOYMENT COMPENSATION LAW.

The State of South Dakota completely ignores and the United States all but ignores the obvious applicability of *NLRB v. Catholic Bishop, supra.*

The statement by the United States that *"Catholic Bishop* has no application to the present case" (*See* U.S.

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determination by the Nevada Employment Security Department that church schools are operated primarily for religious purposes but now takes a different position as amicus curiae before this court. (*See* Amici Curiae Br. by Alabama and Nevada at 12-13 *and* n. 21).

Br. at 22) is particularly implausible in view of the Solicitor of Labor's comment, while the *Catholic Bishop* case was pending before the Supreme Court, that:

> The Supreme Court in that case will hopefully provide guidance as to how far the government can legitimately extend its socio-economic goals into a church-related school. Conversely, it may indicate how narrow is the area of church activity that is protected by the First Amendment. These considerations should eventually help us in how best to construe section 3309(b)(1).[7]

There will be a great deal more than "minimal" involvement by the state in determining what part of a teacher's duties are "religious" and what part are "secular." This is apparent when applying the directive by the Department of Labor to state employment agencies that the only services performed in church-related elementary and secondary schools within the permitted exclusions of section 3309(b)(1) "are those strictly church duties performed by church employees at the schools pursuant to their church responsibilities." (U.S. Department of Labor Unemployment Insurance Program Letter No. 39-78 [J.A. 40]) The manifest potential for excessive entanglement by the states in making determinations of who is subject to the unemployment compensation tax and who is not was recognized in a similar case to that before this court by the U.S. District Court in *Grace Brethren Church v. California,* No. CV79-93, MRP (C.D. Cal., Sept. 21, 1979) *appeal docketed,* No. 79-3763 (9th Cir.,

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[7] Memorandum for the Secretary from Carin Ann Clauss (Mar. 29, 1978 [J.A. 45]).

Nov. 27, 1979); Slip opinion at 10, Ala./Nev. J.A. 181, at 190.[8]

In addition, the fragments of legislative history relied upon by the United States in its brief fall far short of the unmistakable evidence of legislative intent mandated by the Supreme Court. There simply is not one reference to church schools in any of the relevant reports and debates of the 1976 amendments to support any contention of intent, much less an "affirmative intention of the Congress clearly expressed." *NLRB v. Catholic Bishop, supra.*[9] Consequently, the decision by the South Dakota Supreme Court cannot be sustained.

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[8] At Ala./Nev. J.A. 192-193, the court in Grace Brethren, *Id,* referred to intrusive inquiries by the state into the religious content of a teacher's activities, questionnaires requiring identification of "licensed, ordained or commissioned minister(s) among . . . employees," services performed by teachers, and where performed. In a footnote, the court said: "One declaration details the visit of an auditor to a pre-school. The auditor, after asking detailed questions as to what transpired in the music class, the "nature center" and the "block center" ended by classifying music as strictly religious and the nature and block centers as both religious and secular. There is even a list of exempt employees which was given to one of the church schools at the conclusion of an audit. *See* Slip opinion, *ibid.* 20 footnote 11, Ala./Nev. J.A. 200; *see also* Amicus Curiae Brief of Christian Schools International, Appendix A, p. A2-6.

[9] *See* Pet. Br. at 21-22; Amici Curiae Br. by Alabama and Nevada at 18-19. The Secretary's statements in 1970 that "church" is to be defined in its limited sense as an individual "house of worship" (U.S. Br. at 19) are taken out of context. The *1970 Draft Legislation* referred to, if read in its entirety, parrot what Congress said in its reports on the 1970 amendments. *Compare, The Draft Legislation to Implement the Employment Security Amendments of 1970* at 27, summarized at 1B Unempl. Ins. Rep. (CCH) § 1356, at p. 4349 (1977) and identical statements in H.R. Rep. No. 91-612, 91st Cong., 1st Sess. 44 (1969)

V. THE SOUTH DAKOTA SUPREME COURT ERRED IN ACCORDING ANY DEFERENCE TO THE SECRETARY OF LABOR'S INTERPRETATION OF SECTION 3309(b)(1).

The Secretary of Labor's latest interpretation of the exclusions from FUTA are not entitled to any deference from the court because they represent a *reversal* of its *contemporaneous* interpretation of the statute. *See* Amici Curiae Br. of Alabama and Nevada at 18-19.

The first memorandum by the Department of Labor, issued in 1976 (J.A. 34-36), if read in its entirety, and the Department's February, 1977, memorandum (J.A. 36-39) conflict with the Unemployment Compensation Insurance Program Letter No. 39-78 issued on May 30, 1978. (J.A. 40-44)[10]

However, the most fundamental obstacle to according any deference to the Secretary of Labor's 1978 interpretation is that it contradicts the plain language of Sec. 3309 (b)(1) and lacks any support for pertinent legislative history. *See, General Electric Co. v. Gilbert,* 429 U.S. 125, 140-145 (1976); *Morton v. Ruiz,* 415 U.S. 199, 237 (1972); *Social Security Board v. Nierotko,* 327 U.S. 358, 369-370 (1945).

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and S.Rep. No. 91-752, 91st Cong., 2d Sess. 48-49 (1970). The Solicitor of Labor, however, discussing Sec. 3309(b)(1), admits that "if subsection (1) applied to church-related elementary and secondary schools prior to the 1976 amendments it continues to apply since the legislative history is silent." (Memorandum for the Secretary from Carin Ann Clauss, Mar. 29, 1978, J.A. at 52)

[10] *See* Amicus Curiae Br. of California at 4-7, for a discussion of the various memorandum issued by the Department of Labor.

For the foregoing reasons, the South Dakota Supreme Court erred in ruling that the Secretary's interpretation is entitled to "great deference."

VI. SUBJECTING CHURCH ELEMENTARY AND SECONDARY SCHOOLS TO UNEMPLOYMENT COMPENSATION LAW VIOLATES BOTH THE ESTABLISHMENT AND FREE EXERCISE CLAUSES.

The State of South Dakota and the United States attempt to divert attention from Petitioners' and the various amici curiae's constitutional arguments by discussing a series of cases unrelated to the excessive entanglement issue before this court. *See* Resp. Br. at 31-42; U.S. Br. at 23-28.[11]

The Petitioners do not dispute cases which hold government regulations that promote public welfare or safety *and involve no excessive government entanglement with religion* may be applied to churches and their schools. Nor is there any question concerning laws prohibiting practices in violation of social good order. *Reynolds v. United States,* 98 U.S. 145, 164 (1879).[12] Moreover, the Petitioners have never argued that the extension of FUTA to churches that operate elementary

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[11] Resp. Br. at 31 makes the statement that "Petitioners in this case wish to raise the entanglement issue and at the same time, not claim establishment of religion by letting them avoid a tax . . ." overlooking that Walz v. Commissioner, 397 U.S. 664, 672-675 (1970) recognized that the granting of a tax exemption is not the sponsorship or inhibition of religion and that the elimination of an exemption would tend to expand government involvement with religion.

[12] *See, e.g.,* Braunfield v. Brown, 366 U.S. 559 (1961) (state law barring retail sales on Sunday); Jacobson v. Massachusetts, 197, U.S.

and secondary schools is invalid because it "operates so as to make the practice of . . . religious beliefs more expensive." Resp. Br. at 22; U.S. Br. at 29.

The basic issue before this court is the intolerable degree of entanglement resulting from the arbitrary extension of unemployment compensation laws to those churches that operate elementary and secondary schools. (*See* Pet. Br. at 30-38) The State of South Dakota fails to rebut this argument.[13]

Any claim that classification of services performed in church schools into "secular" and "religious" is not required and that the only determination needed is simply whether a person "is employed by the school or by the church" merely begs the question. (Resp. Br. 40-41; U.S

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11 (1905) (upholding compulsory vaccinations); Prince v. Massachusetts, 321 U.S. 158 (1944) (upholding conviction of Jehovah' Witness for violation of child labor laws); *see also,* Lemon v. Kurtzman, 403 U.S. 602 (1971), noting that "[f]ire inspections, building and zoning regulations and state requirements under compulsory school-attendance laws are examples of necessary and permissible contacts."

[13] Petitioners' argument is based on entanglement when a determination has to be made as to what services at the church school are "strictly church duties" and when a determination has to be made on eligibility for benefits when a termination of employment occurs. The Respondent claims that "potential entanglements cannot be used to negate any possible unemployment insurance coverage of church school employees. . ." (Resp. Brief at 39) Respondent misstates the law. The "entanglement" cases are almost entirely concerned with the *potential* for entanglement. In Lemon v. Kurtzman, 403 U.S. 602, 619-620 (1970) the court warned about the "hazards" and "dangers" posed by the statute under question that was "*apt* to entangle" creating a relationship "pregnant" with involvement. Walz v. Tax Commissioner, 397 U.S. 664 (1970), warned against government involvement with religion that could *lead* to "confrontation and conflicts" between government and churches. *Id,* at 674.

Br. at 26) The April 16, 1978, letter from the Secretary of Labor to Bishop Kelly specifically states that "services performed in the schools that may . . . be considered within the scope of the exclusion permitted by 3309(b)(1) are those strictly church duties performed by church employees pursuant to their religious responsibilities within the school. Pet. App. at A4; Ala./Nev. J.A. at 37. The Department of Labor Unemployment Insurance Program Letter No. 39-78 dated May 30, 1978, uses identical language (J.A. at 41) as does the October 31, 1979, decision by the Secretary of Labor at 6a. (Ala./Nev. J.A. at 17)[14] That difficult determinations would have to be made, for example, as to whether in a world history class the teacher spends more than one-half of any given session to teaching purely "religious" or purely "secular" can hardly be subject to doubt.[15]

Excessive entanglement also can occur where hearings are made on unemployment compensation claims of former church-school employees. Pet. Br. at 34-37. Both the Respondent and the United States seem to admit that there might be some inquiry into church doctrine and practice in the event of a hearing on an unemployment compensation claim but that this inquiry would not constitute a First Amendment violation. (Resp. Br. at 38-39;

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[14] The Petitioners assert that the classification required cannot be made without "pervasive monitoring of . . . church agencies by the secular authorities" and continuing evaluation by government "about what does and does not have religious meaning" because everything that is taught is inculcated with religious doctrine. *See* Lemon v. Kurtzman, supra, 403 U.S. at 627; New York v. Cathedral Academy, 434 U.S. 125, 133 (1977); Pet. Br. at 32-38.

[15] See pp. 12-13 and n. 8, *infra,* for examples of how extensively these determinations were made by a state agency pursuant to the directives received by the Department of Labor.

U.S. Br. at 26-28) The testimony of a Department of Labor expert in the Alabama-Nevada conformity hearings before the Department of Labor reveals that evidence at such a hearing would consist of testimony from the employee and church authorities what they understood the doctrine of the church to be; the state hearing officer would be required to appraise the credibility of the employee and the church authorities; and, the hearing officer would have to determine whether the teacher knowingly violated church doctrine.[16]

The Respondent suggests that doctrinal matters are controlled by the church and that the state only need determine if the employee were fired or laid off to determine eligibility for unemployment compensation benefits (Resp. Br. at 37) referring to the decision by the South Dakota Supreme Court (Pet. App. at A14). The United States erroneously amplifies this by stating "[p]etitioners are free to establish whatever work rules they choose . . . Whether or not these rules correctly correspond to church doctrine is irrelevant; violation of the rules constitutes misconduct." U.S. Br. at 28. Those statements misstate the law. Violation of employer work rules does not constitute misconduct under unemployment compensation statutes unless the work rule is reasonable. *See generally,* 76 Am.Jur.2d, Unemployment Compensation § 53. An inquiry into the reasonableness of a work rule based on church doctrine "touches the very core of the constitutional guarantee against religious establishment." *New York v. Cathedral Academy,* 434 U.S. 125 at 133 (1977).

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[16] *See* Amici Curiae Brief by Alabama and Nevada at 26; Transcript of Administrative Hearing in Alabama v. Marshall, supra, dated Sept. 26, 1979, at 108-110, 113-114, 119-120 (Ala./Nev. J.A. 151-153, 156-157, 162-163).

The Respondent states that to raise the entanglement issue there must be some showing that some religion has been established. Resp. Br. at 31. The United States, erroneously agreeing with the Respondent (U.S. Br. at 23), then goes further and suggests that the entanglement cases do not apply because Petitioners have not shown "how the basic prohibition . . . against aid to religion is involved. . ." (U.S. Br. at 24) Both the Respondent and the United States misinterpret the law. The primary effect of the excessive government entanglement is the potential to inhibit or advance religion. *See* Pet. Br. at 37-38. The United States misreads the "school aid" cases it refers to in its brief. (U.S. Br. at 34) The issue in those cases was not "aid" but the entanglement involved by government surveillance to assure that financial aid for legitimate secular purposes would not be diverted to "advance" religion. Those cases were decided on the basis of "entanglement" and not "school aid." Referring to the three-part test for determining whether a challenged statute violates the Establishment Clause, the Supreme Court clearly said that: "If a statute violates any of these three principles, it must be struck down under the Establishment Clause." *Stone v. Graham,* .... U.S. ...., 66 L.Ed.2d 199 (No. 80-320, decided Nov. 17, 1980).

The Petitioners have never disputed the socio-economic importance of unemployment compensation law. What is submitted, however, is that the Respondent has not demonstrated that it is a state interest of sufficient magnitude to override the Free Exercise rights guaranteed under the Constitution. *See, Wisconsin v. Yoder,* 406 U.S. 205 at 214 (1972).[17] Further, there is no showing whatever that there is no other way to reach the socio-

[17] The Respondent erroneously states that St. Martin Lutheran Church "closed its doors" in 1979. (Resp. Br. at 29) Northwestern Lutheran Academy did not continue classes for the 1980 and 1981

economic goals of FUTA without violating the legitimate Free Exercise claims of the Petitioners. *See, Barnett v. Rodgers,* 410 F.2d 995, 1000 (D.C. Cir. 1969); *Wisconsin v. Yoder, supra,* at 215; *see also discussion in* Amicus Curiae Br. of Americans United for Separation of Church and State, at 11-13.

The Respondent has failed to rebut the Petitioners' argument that extension of unemployment compensation law to services in church schools will cause excessive and enduring governmental entanglement with religion in violation of both of the Religion Clauses. Therefore, if this Court determines that Sec. 3309(b)(1) does not apply to the Petitioners, the decision by the South Dakota Supreme Court must nevertheless be set aside and reversed.

CONCLUSION

For the reasons stated herein, and those set forth in their main Brief, the Petitioners request this court to reverse and set aside the Decision by the South Dakota Supreme Court.

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school year but continues its full maintenance staff. Unless the decision by the South Dakota Supreme Court is reversed, Northwestern Lutheran Academy is liable for past and present unemployment compensation tax liability.

Supreme Court, U. S.
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DEC 18 1980

No. 80-120

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH, *et al.*,
Petitioners

v.

STATE OF SOUTH DAKOTA,
Respondent

On Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF THE STATES OF ALABAMA AND NEVADA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Supreme Court of South Dakota erred in accepting the United States Secretary of Labor's interpretation of section 3309 of the Federal Unemployment Tax Act to require the extension of state unemployment compensation laws to church elementary and secondary schools, when the plain language of section 3309(b)(1) exempts such schools from coverage, there is no evidence that Congress intended coverage of such schools, and coverage presents serious constitutional problems under the Religion Clauses of the First Amendment.

2. Whether the extension of state unemployment compensation laws to church elementary and secondary schools would result in excessive governmental entanglement with religion in violation of the Religion Clauses of the First Amendment.

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BRIEF OF THE STATES OF ALABAMA AND NEVADA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE STATES OF ALABAMA AND NEVADA

On October 31, 1979, the United States Secretary of Labor decided to withhold certification from the States of Alabama and Nevada under the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3311 ("FUTA"), because they had failed to extend their unemployment compensation laws to employees performing services in church elementary and secondary schools. Alabama and Nevada sought review of the Secretary of Labor's ruling

in the United States Court of Appeals for the Fifth Circuit, contending that the Secretary's interpretation of FUTA was erroneous and constitutionally impermissible. On September 8, 1980, the Fifth Circuit set aside the Secretary of Labor's decision. *Alabama & Nevada* v. *Marshall*, 626 F.2d 366. A Petition for a Writ of Certiorari in that case was filed by the Secretary of Labor on December 8, 1980, No. 80-922. This Court had not yet acted upon the Petition at the time this brief was filed.

The decision of the Supreme Court of South Dakota in this case raises the same basic issue presented in the proceedings brought by the Secretary of Labor against Alabama and Nevada. This Court's resolution of the South Dakota case will thus likely determine whether Alabama and Nevada are entitled to certification under FUTA. A denial of certification would subject Alabama and Nevada to the loss of millions of dollars in federal grants for administration of their unemployment programs and would result in the denial of hundreds of millions of dollars in tax credits to private employers in those States. *See* 26 U.S.C. § 3302; 29 U.S.C. §§ 49-49k; 42 U.S.C. §§ 501-504.

Because of the serious impact that a denial of certification under FUTA would have upon the States and their citizens, Alabama and Nevada have a substantial interest in resolution of the issues raised by the decision of the Supreme Court of South Dakota.[1]

STATEMENT OF THE CASE

Prior to 1970, FUTA did not require coverage for employees of nonprofit organizations. In the Employment Security Amendments of 1970, Pub. L. No. 91-373, 84 Stat. 695 (hereinafter "1970 Amendments"), Congress required states to extend unemployment insurance

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[1] This brief is filed by the States of Alabama and Nevada as Amici Curiae pursuant to Rule 36.4 of the Rules of this Court.

coverage to employees of many nonprofit organizations as a condition to certification under the FUTA program. Among the exemptions provided by the 1970 Amendments for certain types of nonprofit employers was an exemption now contained in section 3309(b)(1) for service performed:

> in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches.

See 1970 Amendments, § 104, 84 Stat. 698. In addition, section 3309(b)(3) contained an exemption for service performed "in the employ of a school which is not an institution of higher education." *Id.* Thus, the language of two exemptions in the 1970 Amendments—section 3309(b)(1) and section 3309(b)(3)—was applicable to services performed in church elementary and secondary schools.

In 1976, Congress deleted the exemption contained in section 3309(b)(3), thereby extending coverage to services in the employ of public elementary and secondary schools [2] and nonprofit elementary and secondary schools not otherwise exempt from coverage.[3] Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, § 115, 90 Stat. 2670 (hereinafter "1976 Amendments"). Immediately after the deletion of the exemption in sec-

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[2] A major purpose of the 1976 Amendments was to require states to include under their unemployment compensation laws most services performed in the employ of state and local governments. *See* 1976 Amendments, § 115, 90 Stat. 2670. Deletion of the exemption in section 3309(b)(3) was thus necessary to extend coverage to employees of public elementary and secondary schools.

[3] The Senate Committee considering the 1976 Amendments stated that coverage would be required for nonprofit elementary and secondary schools "on the same basis as it is required for other nonprofit entities." S. Rep. No. 94-1265, 94th Cong., 2d Sess. 10 (1976).

tion 3309(b)(3), the United States Department of Labor issued a memorandum to all state unemployment agencies specifically addressing the effect of the 1976 Amendments on church-related schools. The memorandum stated that the amendments do "not affect the optional exclusion in 3309(b)(1)."[4] A few months later, the Department issued another memorandum to state unemployment agencies explaining that the test for deciding whether services are exempt from coverage under section 3309(b)(1) is simply whether the employer is a church or church-related organization as described in that section.[5]

More than a year after the latter memorandum from the Department, the United States Solicitor of Labor reassessed the Department's position concerning the applicability of the exemptions in section 3309(b)(1) to church elementary and secondary schools. The Solicitor noted that she would be "comfortable defending" either a position that 3309(b)(1) applies to church elementary and secondary schools, or a contrary "coverage" position.[6] Although the Solicitor explicitly recognized both the "silent legislative history" of the 1976 Amendments with respect to requiring coverage for church school employees, and the "possible constitutional involvement" inherent in the application of FUTA to church schools,[7] she recommended a "coverage" position because the Department's Employment and Training Administration "has

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[4] Supplement #1—Questions and Answers Supplementing *Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976—P.L. 94-566* (Dec. 7, 1976), Appendix E to Petition for a Writ of Certiorari at A-63.

[5] Supplement #2—Questions and Answers Supplementing *Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976—P.L. 94-566* (Feb. 2, 1977), Appendix F to Petition for a Writ of Certiorari at A-67.

[6] Memorandum for the Secretary from Carin Ann Clauss (Mar. 29, 1978) (hereinafter "Clauss Memorandum") (Joint Appendix [hereinafter "J.A."] A-52.)

[7] *Id.*

been informally indicating a coverage position to the state agencies [and a] change to a 'no coverage' position now . . . most likely will alienate state agencies most of whom have been supportive of coverage." [8] In making this recommendation, the Solicitor advised the Secretary that the then-anticipated decision in *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979), "will hopefully provide guidance as to how far the government can legitimately extend [its] socio-economic goals into a church-related school." [9]

Following the Solicitor's recommendation, the Secretary announced for the first time, on April 18, 1978, that section 3309 of FUTA requires state unemployment compensation laws to cover services performed in church elementary and secondary schools.[10] The Department of Labor soon thereafter directed state unemployment agencies to inform all church elementary and secondary schools that the only services exempt from coverage under section 3309(b)(1)(A) are "those strictly church duties performed by church employees at the schools pursuant to their church responsibilities," and that the exemption in section 3309(b)(1)(B) has no applicability whatsoever to services performed in church elementary and secondary schools.[11]

Many states, including the State of South Dakota, acceded to the Secretary's instructions to cover employees in church elementary and secondary schools.[12] The South

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[8] *Id.* at A-51 - A-52.

[9] *Id.* at A-51.

[10] *See* In re Northwestern Lutheran Academy, 290 N.W.2d 845, 847 (S.D. 1980), *cert. granted sub nom.* St. Martin Evangelical Lutheran Church *et. al* v. State of South Dakota, No. 80-120 (U.S., Nov. 3, 1980).

[11] Unemployment Insurance Program Letter No. 39-78 (May 30, 1978) (hereinafter "UI Program Letter 39-78") (J.A. A-42.)

[12] Alabama originally took steps to comply with the Secretary of Labor's directive, but was enjoined by an Alabama circuit court from carrying out the Secretary's instructions. Nevada refused to

Dakota Circuit Court, however, set aside the state agency's determination that St. Martin's Evangelical Lutheran School and Northwestern Lutheran Academy were not exempt from coverage under the section of state law modeled upon section 3309(b)(1) of FUTA. The Supreme Court of South Dakota reversed that decision, *In re Northwestern Lutheran Academy, supra,* in a ruling which is contrary to the decision of the United States Court of Appeals for the Fifth Circuit in *Alabama & Nevada* v. *Marshall, supra,* and to the decisions of all other federal and state courts which to the knowledge of Alabama and Nevada have considered the Secretary of Labor's position.[13] This Court granted review of the decision of the Supreme Court of South Dakota to resolve the important issues raised by the Secretary of Labor's interpretation of FUTA.

SUMMARY OF ARGUMENT

In accepting the United States Secretary of Labor's interpretation of FUTA to require coverage of employees in church elementary and secondary schools, the Supreme Court of South Dakota compounded the Secretary's distorted analysis of both the statute and the Constitution. The Secretary of Labor's interpretation ignores plain and unambiguous language in section 3309(b)(1) exempting from coverage services performed in the employ of a church or a church-related organization operated primarily for religious purposes. Services in church elementary and secondary schools fit squarely within the language of these exemptions.

The interpretation of section 3309(b)(1) endorsed by the Supreme Court of South Dakota is without a shred of support in the legislative history of FUTA. Moreover, the interpretation is directly contrary to the well-established precedent of this Court that statutes must be

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follow the Secretary's directive on the basis that FUTA exempted services performed in church elementary and secondary schools.

[13] *See* pp. 9-10 & n.17, p. 14 & n.23, *infra.*

construed to avoid resolution of serious constitutional issues under the Religion Clauses of the First Amendment.

Finally, even if the terms of FUTA required coverage of church elementary and secondary school employees, such coverage would create the kind of excessive governmental entanglement with religion that the Religion Clauses of the First Amendment forbid. For these reasons, this Court should reverse the decision of the Supreme Court of South Dakota.

ARGUMENT

I. THE SUPREME COURT OF SOUTH DAKOTA ERRED IN ACCEPTING THE SECRETARY OF LABOR'S INTERPRETATION OF SECTION 3309 (b)(1) OF FUTA TO REQUIRE THE EXTENSION OF STATE UNEMPLOYMENT COMPENSATION LAWS TO SERVICES PERFORMED IN CHURCH ELEMENTARY AND SECONDARY SCHOOLS.

A. The Plain Language of Section 3309(b)(1) Exempts Church Elementary and Secondary School Employees from Coverage.

It is an elementary principle of statutory construction that when the words of a statute are clear, the plain language of the statute is controlling. *See TVA* v. *Hill*, 437 U.S. 153, 173, 184 n.29 (1978); *Ex Parte Collett*, 337 U.S. 55, 61 (1949); *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917). The Supreme Court of South Dakota erred in failing to determine whether services performed in church elementary and secondary schools were within the plain language of section 3309(b)(1).[14]

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[14] Instead of focusing on the language of FUTA, the Supreme Court of South Dakota ruled that the "threshold question on appeal involves a determination of congressional intent." 290 N.W.2d at 847. The court then ruled that services in church elementary and secondary schools are not exempt under section 3309(b)(1)(B), and never ruled upon the applicability of section 3309(b)(1)(A). *See id.* at 848-49.

1. *Section 3309(b)(1)(A)*

The plain language of section 3309(b)(1)(A) refutes the Secretary of Labor's position, accepted by the Supreme Court of South Dakota, that services in church schools are not exempt under that section unless they constitute "those strictly church duties performed by church employees pursuant to their religious responsibilities within the school." *In re Northwestern Lutheran Academy*, *supra*, 290 N.W.2d at 847 (quoting Letter from Secretary of Labor Ray Marshall to The Most Reverend Thomas C. Kelly (Apr. 18, 1978)); *see Alabama & Nevada* v. *Marshall*, *supra*, 626 F.2d at 368. The language of section 3309(b)(1)(A) "plainly indicates that the exemption is contingent upon who the employer is . . . and not upon the type of services the employee is performing." *Id.* at 369. There is no doubt that services in a vast number of church elementary and secondary schools are performed in the direct employ of an entity which is a "church or convention or association of churches," and that such services are therefore exempt under section 3309(b)(1)(A).

In ruling that services in church elementary and secondary schools in Alabama and Nevada are performed "in the employ of a church" under section 3309(b)(1)(A), the Fifth Circuit recognized that "many of the church schools have no separate legal existence from their church; the school employees are hired, controlled, disciplined, and fired by church representatives and officials; school buildings are owned by the church; and school employees are paid with funds drawn from the church accounts." 626 F.2d at 368.[15] The schools in the

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[15] The Fifth Circuit's description of church elementary and secondary schools was based on stipulated facts agreed to by the Secretary of Labor and the States of Alabama and Nevada regarding the operation and organization of Baptist, Lutheran and Roman Catholic Church schools. *See* Alabama Exhibit (hereinafter "Ala. Exh.") A at ¶¶ 21, 23-26, 38-41, 57, 65, 68-69, 77 (Joint Appendix filed in Alabama & Nevada v. Marshall, *supra*, which is being lodged

instant case also fit squarely within the plain language of section 3309(b)(1)(A). St. Martin's Evangelical Lutheran School is not a separate legal entity from St. Martin Evangelical Church; members of the local church congregation supervise the school; and the school is completely financed by the local congregation. Appendix C to Petition for a Writ of Certiorari at A-38, ¶ XII. Northwestern Lutheran Academy is not a separate legal entity from the Wisconsin Evangelical Lutheran Synod; the Synod controls the operation and policy of the Academy; and the Synod is the principal source of the Academy's support. *Id.* at A-39, ¶¶ XV, XVI.

The foregoing description of the relationship between churches and their elementary and secondary schools clearly demonstrates that persons performing services in many such schools are employed by a "church or convention or association of churches," and thus are within the plain language of section 3309(b)(1)(A).[16] Not surprisingly, all federal and state courts which to the knowledge of Alabama and Nevada have considered the

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with this Court in No. 80-922 [hereinafter "Ala./Nev. J.A."] 51-53, 55-56, 60, 63-65); Nevada Exhibit (hereinafter "Nev. Exh.") A at ¶¶ 2-9, 27-29, 33-35 (Ala./Nev. J.A. 93-95, 98-99).

[16] This conclusion is in accord with judicial precedent recognizing that church elementary and secondary schools form an "integral part" of their governing church. *See, e.g.*, Surinach v. Pesquera de Busquets, 604 F.2d 73, 76 (1st Cir. 1979); McCormick v. Hirsch, 460 F. Supp. 1337, 1353 (M.D. Pa. 1978). *See also* Lemon v. Kurtzman, 403 U.S. 602, 616 (1971) (parochial schools constitute "'an integral part of the religious mission of the Catholic Church'").

The Secretary of Labor in the past has summarized his position on section 3309(b)(1)(A), stating "church-related schools are not 'churches' and therefore their employees are not exempt." Respondent's Brief at 26, filed in Alabama & Nevada v. Marshall, *supra*, which is being lodged with this Court in No. 80-922. The question under section 3309(b)(1)(A), however, is *not* whether church schools are churches, but whether persons performing services in church schools are performing those services "in the employ of a church or convention of association of churches."

issue have held that the exemption in section 3309(b)(1)(A) is applicable to church elementary and secondary school employees.[17]

The Secretary of Labor has contended that the term "church" in section 3309(b)(1)(A) means a physical house of worship and that therefore the only exempt services are "those strictly church duties performed by church employees at the school[s] pursuant to their church responsibilities." *Alabama & Nevada* v. *Marshall*, *supra*, 626 F.2d at 368 (quoting UI Program letter 39-78).[18] The Secretary's interpretation completely fails to recognize that a physical building cannot "employ" anyone,[19] and also ignores the fact that section 3309(b)(1)

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[17] *See* Alabama & Nevada v. Marshall, *supra*, 626 F.2d at 368-69; Grace Brethren Church v. California, No. CV 79-93 MRP, slip op. at 7-8 (C.D. Cal., Sept. 21, 1979) (granting preliminary injunction), *appeal dismissed*, No. 79-3763 (9th Cir., July 24, 1980), *supplemental opinion*, slip op. at 2 (C.D. Cal., June 2, 1980), *appeal dismissed*, No. 79-3784 (9th Cir., July 21, 1980); Lutheran Church-Missouri Synod v. Bowling, No. 501-78, slip op. at 4 (Ill. App. Ct., Oct. 1, 1980), *appeal docketed*, No. 54249 (Ill. Sup. Ct., Dec. 15, 1980); Grace Lutheran Church v. North Dakota Empl. Sec. Bur., Civ. No. 9719, slip op. at 8 (N.D., June 20, 1980); Roman Catholic Church v. Louisiana, No. 13,541, slip op. at 3-4 (La. Ct. App., June 9, 1980); Catholic Diocese v. Labor & Indus. Rel. Comm., No. CV 179-745cc, slip op. at 1-2 (Mo. Cir. Ct., Mar. 28, 1980), *appeal docketed*, No. 31780 (Mo. Ct. App., Apr. 28, 1980); Trinity Evangelical Lutheran Church v. Department of Indus. Rel., No. CV 78-500325 McR, slip op. at 17 (Ala. Cir. Ct., Jan. 29, 1979), *appeal dismissed*, No. 78-440 (Ala. Sup. Ct., May 31, 1979); *see also* Fischer v. Board of Appeals, No. 1979/1230/19724 (Balt., Md., City. Ct., May 13, 1980) (notice of appeal filed Aug. 14, 1980); Begley v. Employment Sec. Dept. No. 78-CVS-8531 (N.C. Super. Ct., Mar. 4, 1980) (notice of appeal filed Mar. 6, 1980).

[18] The Secretary has defined "church duties" as "the administration of sacerdotal functions and the conduct of religious worship." *See* Respondent's Brief at 18-21, 25-26, filed in Alabama & Nevada v. Marshall, *supra*, which is being lodged with this Court in No. 80-922.

[19] The dissenting opinion of Justice Henderson of the Supreme Court of South Dakota recognized this fact, stating, "[i]f the term 'church' in isolation is ambiguous, the context of this statute abso-

(A) contains no indication that the exemption is dependent upon the nature of the services performed. Moreover, as the Fifth Circuit recognized in rejecting the Secretary of Labor's interpretation of section 3309(b)(1)(A):

> [T]he plain meaning of "church" requires a definition as something qualitatively greater than the physical building of worship and, at a minimum, the term encompasses the legal entity commonly referred to as a church. The Secretary would avoid the legal consequences of this definition by excluding the very people which comprise a church as an entity and perform its functions. For this court to adopt such a limited definition would be for us to ignore the historic function of churches and defy the definition of the word as used in our vocabulary. [*Id.* at 369.]

Despite the clear applicability of section 3309(b)(1)(A) to church elementary and secondary school employees, the Supreme Court of South Dakota never even addressed whether services in schools such as St. Martin's Evangelical Lutheran School and Northwestern Lutheran Academy are exempt under the language of that section. This Court should reverse the decision of the Supreme Court of South Dakota and hold that the plain language of section 3309(b)(1)(A) applies to all services performed in church elementary and secondary schools which are not separate legal entities from their respective churches.

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lutely forecloses equation with a physical plant." 290 N.W.2d at 854.

The Secretary's interpretation of the word "church" to mean a physical house of worship rather than a legal entity is inconsistent not only with the manner in which the word is used in FUTA, but also with its use in other federal statutes. *See, e.g.*, Employment Retirement Income Security Act of 1974, 29 U.S.C. §§ 1002(33)(A), (B), 1003(b)(2) (dealing with retirement plans of employees of churches); 26 U.S.C. § 6033(a)(2)(A) (churches excluded from filing information income tax returns); 26 U.S.C. § 7605(c) (restrictions on examining books of accounts of churches).

2. Section 3309(b)(1)(B)

Services performed in church elementary and secondary schools may also be exempt from coverage under the plain language of section 3309(b)(1)(B), which applies to services performed in the employ of "an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches."[20] This Court has consistently acknowledged that church elementary and secondary schools exist for a primarily religious purpose. In *Meek* v. *Pittenger*, 421 U.S. 349 (1975), for example, the Court explained:

> The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. . . . "[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined." [*Id.* at 366 (citations omitted).]

See also NLRB v. *Catholic Bishop*, *supra*, 440 U.S. at 503 (quoting from *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 616, referring to the "substantial religious character of these church-related schools").

The record in this case unquestionably demonstrates that church elementary and secondary schools have a primarily religious purpose. It is undisputed that the Wisconsin Evangelical Lutheran Synod believes that "training of . . . youth involves both education and religion and that the two are so closely interwoven they cannot be separated." Appendix C to Petition for a

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[20] Although Alabama and Nevada maintain that services in church elementary and secondary schools with no separate corporate existence from their church are exempt under section 3309(b)(1)(A), services in such schools, along with services in separately incorporated church schools, are also entitled to exemption under section 3309(b)(1)(B).

Writ of Certiorari at A-36, ¶ III. The Synod's school system is maintained in order to extend and conserve the doctrine and practice of the Evangelical Lutheran Church. *Id.* at A-36, ¶ II. All courses at St. Martin Evangelical Lutheran School and at Northwestern Lutheran Academy are taught from a religious viewpoint based on scriptural convictions held by members of the Synod. *Id.* at A-39, ¶ XIV, A-40, ¶ XIX. The Academy serves the special purpose of recruiting and providing training for future workers in the church preaching and teaching ministry. *Id.* at A-39, ¶ XVI.[21]

The record also demonstrates that church elementary and secondary schools are "operated, supervised, controlled or principally supported by a church or convention or association of churches," thus meeting the second part of the test for exemption under section 3309(b)(1)(B). *See* Appendix C to Petition for a Writ of Certiorari

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[21] The United States Department of Labor stipulated to similar facts in Alabama & Nevada v. Marshall, *supra*, demonstrating the primarily religious purpose of elementary and secondary schools of the Baptist, Lutheran and Catholic faiths. For example, the Department stipulated that Baptist churches, "in observance of the commands of the Holy Bible, as a matter of firm religious conviction and religious practice, operate all of their . . . ministries [which include their elementary and secondary schools] for the ultimate purpose of spreading the Gospel message concerning the salvation of man in and through the Lord Jesus Christ." Ala. Exh. A at ¶¶ 19, 20 (Ala./Nev. J.A. 51). The Department stipulated that "[t]he Roman Catholic Church founded an alternative elementary and secondary school system in the Diocese of Reno-Las Vegas, as elsewhere, for religious reasons," and that "[t]he fundamental mission of [such schools] is to transmit the Roman Catholic faith from generation to generation and instill Catholic values in their students." Nev. Exh. A at ¶ 11 (Ala./Nev. J.A. 95); *see* Ala. Exh. A at ¶ 77 (Ala./Nev. J.A. 65). The record also demonstrates that to achieve their primarily religious purpose, church elementary and secondary schools in Alabama and Nevada mandate participation in religious instruction and religious services, and teach all courses with religious content. *See* Ala. Exh. A at ¶¶ 27-28, 33-34, 74-75, 77 (Ala./Nev. J.A. 53, 54, 65); Nev. Exh. A at ¶¶ 10, 14, 16, 30, 32 (Ala./Nev. J.A. 95, 96, 98, 99).

at A-38, ¶ XII (St. Martin's School "is 100% financed by the local congregation"), A-39, ¶ XV (the "Synod is the principal source of support for" the Academy).[22] For these reasons, church elementary and secondary schools are plainly exempt under the provisions of section 3309 (b) (1) (B) of FUTA.[23]

B. There Is No Evidence That Congress Intended To Require the Extension of State Unemployment Compensation Laws to Services Performed in Church Elementary and Secondary Schools.

The congressional committees considering the 1970 Amendments to FUTA engaged in very limited discussion of section 3309(b) (1). The committees explained that this section

> excludes services of persons where the employer is a church or convention or association of churches, but does not exclude certain services performed for an organization which may be religious in orientation unless it is operated primarily for religious purposes and is operated, supervised, controlled, or principally supported by a church (or convention or association of churches). Thus, the services of the janitor of a church would be excluded, but services of a janitor for a separately incorporated college, although it may be church related, would be covered. A college devoted primarily to preparing students

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[22] Similarly, the record in Alabama & Nevada v. Marshall, *supra*, demonstrated that church elementary schools are operated, supervised, controlled and principally supported by a church. *See* Ala. Exh. A at ¶¶ 19, 22-25, 35, 51, 64-65, 77 (Ala./Nev. J.A. 51-55, 58-59, 62-63, 65); Nev. Exh. A at ¶¶ 1, 4, 7-9, 19, 34-35 (Ala./Nev. J.A. 93-95, 97, 99).

[23] Several courts have so held. *See* Grace Brethren Church v. California, *supra*, slip op. at 3 (supplemental opinion); Roman Catholic Church v. Louisiana, *supra*, slip op. at 3; Catholic Diocese v. Labor and Indus. Rel. Comm., *supra*, slip op. at 1-2; Employment Division v. Archdiocese of Portland, 42 Ore. App. 421, 600 P.2d 926, 927-28 (1979); Trinity Evangelical Lutheran Church v. Department of Indus. Rel., *supra*, slip op. at 17-19.

> for the ministry would be exempt, as would be a novitiate or a house of study training candidates to become members of religious orders. On the other hand, a church related (separately incorporated) charitable organization (such as, for example, an orphanage or a home for the aged) would not be considered under this paragraph to be operated primarily for religious purposes. [S. Rep. No. 91-752, 91st Cong., 2d Sess. 48-49 (1970); H. Rep. No. 91-612, 91st Cong., 1st Sess. 44 (1969).]

These statements demonstrate that Congress intended the exemptions in section 3309(b)(1) to depend upon the nature of the employing organization. If the employer is a church or church-related organization operated primarily for religious purposes, all services for that employer are exempt under section 3309(b)(1)(A). Moreover, by referring to "church related" organizations within section 3309(b)(1)(B) as "separately incorporated" organizations, Congress recognized that services performed for organizations with no corporate existence apart from a church are performed in the employ of the church and are thus exempt from coverage under section 3309(b)(1)(A). The congressional reports further support the proposition that *any* type of employment for a church or qualifying church-related organization, even in the capacity of a janitor, is exempt from coverage. The legislative history of the 1970 Amendments thus is fully consistent with the plain language of sections 3309(b)(1)(A) and (B).

The South Dakota Supreme Court mistakenly assumed that the congressional committees' discussion of church-affiliated colleges in connection with the 1970 Amendments would be applicable to church elementary and secondary schools. *See* 290 N.W.2d at 848.[24] No issue

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[24] The South Dakota Supreme Court's reliance on the general statement by the House Ways and Means Committee that it was concerned about the needs of employees of nonprofit religious, charitable, educational and humane organizations, *see* 290 N.W.2d

involving church elementary and secondary schools was before the committees in connection with the 1970 Amendments, however, because all schools below the college level were at that time exempt. *See* p. 3, *supra*. Moreover, many decisions of this Court and lower courts have recognized that while advancement of religion may not be a substantial purpose of church-affiliated colleges, it is a primary purpose of church elementary and secondary schools. *See Tilton* v. *Richardson*, 403 U.S. 672, 687 (1971); *see also Roemer* v. *Board of Public Works*, 426 U.S. 736, 755-58, 765 (1976); *Meek* v. *Pittenger*, *supra*, 421 U.S. at 366; *Americans United for Separation of Church & State* v. *Bubb*, 379 F. Supp. 872, 891 (D. Kan. 1974).

The legislative history of the 1976 Amendments also lacks any evidence that Congress intended to require coverage for church elementary and secondary schools. There is not one reference to churches or church schools in the hundreds of pages of reports and debates. It is simply incomprehensible that Congress would have intended the 1976 Amendments to have such far-reaching significance for virtually every major church group in the country without a single statement on the issue in the legislative history.

The ambiguous fragments of legislative history of the 1976 Amendments relied on by the Supreme Court of South Dakota do not support its decision. The isolated figure in a table in the Senate Report indicating that the 1976 Amendments would provide coverage for an additional 242,000 employees of nonprofit organizations, *see* S. Rep. No. 94-1265, *supra*, at 10, was not accompanied by any indication that it included employees in church schools, and there is no reason to believe Con-

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at 848 (quoting H. Rep. No. 91-612, 91st Cong., 1st Sess. 11 (1969)), is misplaced. The Committee's statement is of no assistance in interpreting the exemptions from coverage that Congress actually enacted for certain types of nonprofit employers, including religious organizations.

gress understood the number to include such employees. For these reasons, the Administrative Law Judge in the proceedings before the Department of Labor in *Alabama & Nevada* v. *Marshall*, *supra*, emphatically rejected the Secretary of Labor's reliance on this figure, stating:

> [T]he Department's reliance on a reference in the legislative history to the figure of 242,000 employees in all non-profit elementary and secondary schools as evidence of Congressional intent to cover employees of church schools is wholly misplaced. Department testimony in this case reflects that the figure is without meaning unless accompanied by the raw data, and admittedly, the record is silent as to Congressional understanding of the figure or the supporting data. In any event, a legislative cloak embracing integral church functions can hardly be woven with such a slender thread.[25]

Moreover, the suggestion that the repeal of section 3309(b)(3) would have been meaningless unless services in church elementary and secondary schools were intended to be covered is spurious. Repeal of the exclusion in section 3309(b)(3) was necessary to assure that coverage was extended to employees in public elementary and secondary schools, who vastly outnumber employees in church elementary and secondary schools. *See* note 2, *supra*.[26]

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[25] Recommended Decision dated Oct. 11, 1979, at 8 (Ala./Nev. J.A. 8).

[26] The South Dakota Supreme Court relied on a remark in a House Report, *see* H. Rep. No. 94-755, 94th Cong., 1st Sess. 56 (1975), which it interpreted as suggesting that services for all educational institutions would be covered as a result of the 1976 Amendments. However, this remark is ambiguous with respect to whether only public institutions were being discussed and is admittedly overbroad, as even the Secretary of Labor would admit that some religious educational institutions, *i.e.*, seminaries, are exempt. *See* In re Northwestern Lutheran Academy, *supra*, 290 N.W.2d at 848. In any event, there is no evidence that the comment was directed at church schools.

As the foregoing analysis reveals, the legislative history of the 1970 and 1976 Amendments is fully consistent with the plain language of section 3309(b)(1) and supplies no basis for the distorted interpretation of FUTA adopted by the Secretary of Labor and accepted by the Supreme Court of South Dakota.

C. The Secretary of Labor's Interpretation of Section 3309(b)(1) Is Not Entitled to Any Deference.

The Supreme Court of South Dakota ruled that the Secretary of Labor's interpretation of section 3309(b)(1) is entitled to "great deference." 290 N.W.2d at 849. However, the doctrine according deference to the construction of a statute by the agency charged with its administration is not applicable in this case for several reasons.

First, the Secretary of Labor's interpretation of FUTA to require coverage of church elementary and secondary school employees does not represent a contemporaneous construction of the 1976 Amendments. *See General Electric Co.* v. *Gilbert*, 429 U.S. 125, 142 (1976). As previously discussed, the Department of Labor issued an interpretation of the 1976 Amendments immediately after the repeal of section 3309(b)(3), which stated that the repeal did not affect the optional exclusion for church elementary and secondary schools in section 3309(b)(1). *See* pp. 3-4, *supra*. The Secretary's present interpretation, first announced in 1978, represents an agency *reversal* of its *contemporaneous* interpretation of the statute.

Second, as the foregoing analysis demonstrates, the Department of Labor's position has not been constant. *See Alabama & Nevada* v. *Marshall*, 626 F.2d at 368 (referring to "over a year of equivocation" by the Secretary). Such lack of consistency negates any respect that might otherwise be due to an administrative interpretation. *See General Electric Co.* v. *Gilbert*, 429 U.S. at 142.

Third, the Solicitor of Labor's memorandum to the Secretary, *see* pp. 4-5, *supra*, strongly suggests that the Secretary's present position was prompted by fear of alienating state agencies, and was impermissibly influenced by political factors extraneous to relevant statutory considerations. *See D.C. Federation of Civic Associations* v. *Volpe*, 459 F.2d 1231, 1246 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972). Thus, the validity of the reasoning of the Secretary's interpretation is doubtful. *General Electric Co.* v. *Gilbert*, *supra*, 429 U.S. at 142 (quoting from *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)).

Finally, the most fundamental obstacle to according any deference to the Secretary's interpretation is that it contradicts the plain language of section 3309(b)(1) and lacks any support from the pertinent legislative history. *See General Electric Co.* v. *Gilbert*, *supra*, 429 U.S. at 145; *Morton* v. *Ruiz*, 415 U.S. 199, 237 (1974); *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369-70 (1946).

For all of the foregoing reasons, the Supreme Court of South Dakota erred in holding that the Secretary's interpretation is entitled to deference.

D. The Interpretation of Section 3309(b)(1) Adopted by the Supreme Court of South Dakota Must Be Rejected Because It Demands Resolution of Difficult and Sensitive Questions Under the First Amendment to the Constitution Without an "Affirmative Intention of Congress Clearly Expressed" To Cover Church Schools.

In *NLRB* v. *Catholic Bishop*, *supra*, this Court held that when an agency's interpretation of a statute gives rise to serious constitutional questions under the Religion Clauses of the First Amendment, it must be rejected unless it represents "the affirmative intention of the Congress clearly expressed." 440 U.S. at 500-01. Only when such unmistakable evidence of congressional

intent exists should a court determine whether a proposed interpretation of the statute is impermissible on constitutional grounds.

In the *Catholic Bishop* case, the Court determined that the NLRB's assertion of jurisdiction over church schools presented a significant risk of excessive governmental entanglement with religion. *Id.* at 497, 502. The Court then examined the legislative history of the National Labor Relations Act to determine whether there was an "affirmative intention of Congress clearly expressed" to extend jurisdiction to church schools. *Id.* at 502-04. The Court found no clear evidence of such intention and ruled that the NLRB's interpretation of its statutory jurisdiction must therefore be set aside. *Id.* at 504-07.

As the Solicitor of Labor previously recognized, *see* p. 5, *supra*, the *Catholic Bishop* decision squarely applies here. This Court's ruling in that case demands that the Secretary of Labor's interpretation of section 3309 of FUTA be rejected. As we will show in Section II, below, there is "abundant evidence," *NLRB* v. *Catholic Bishop*, *supra*, 440 U.S. at 507, that the extension of state unemployment compensation laws to church elementary and secondary schools would result in excessive church-state entanglement and thus would violate the Religion Clauses of the First Amendment. Moreover, as already demonstrated, the fragments of legislative history relied on by the Secretary of Labor and the Supreme Court of South Dakota completely fail to reveal an "affirmative intention of Congress clearly expressed" to require coverage of church elementary and secondary schools.

II. THE EXTENSION OF STATE UNEMPLOYMENT COMPENSATION LAWS TO SERVICES PERFORMED IN CHURCH ELEMENTARY AND SECONDARY SCHOOLS WOULD RESULT IN EXCESSIVE GOVERNMENTAL ENTANGLEMENT WITH RELIGION IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

Even if the Secretary of Labor's interpretation of FUTA were correct, the Court would be required to reverse the decision of the Supreme Court of South Dakota on constitutional grounds. The unavoidable result of the extension of state unemployment compensation laws to church elementary and secondary schools would be continuing, pervasive state supervision of, and conflict with, church schools and their sponsoring churches.

In order to comply with the Secretary's decision, state unemployment agency officials would be required to undertake religious-oriented inquiries in ascertaining what services at church schools are "strictly church duties," and in conducting hearings into the reasons for a church school employee's termination of employment. Church officials would be forced to assume extensive recordkeeping and reporting responsibilities with regard to church and school activities. State officials would be required to evaluate church school compliance with the regulatory scheme and to correct any perceived deviation therefrom through elaborate enforcement powers. These inevitable consequences of the interpretation of FUTA adopted by the Secretary of Labor and endorsed by the Supreme Court of South Dakota would constitute excessive governmental entanglement with religious groups, in violation of the Religion Clauses of the First Amendment and, as applied to the states, the Fourteenth Amendment.

The entanglement doctrine was first formulated by this Court in *Walz* v. *Tax Commission*, 397 U.S. 664 (1970). In that case, the Court stated that enactments which did not actually aid or support religion were none-

theless violative of the Establishment Clause if the legislation at issue resulted in "official and continuing surveillance" of church activities by state officials charged with enforcing statutory standards. *Id.* at 675.

Since *Walz*, the Court has employed the excessive entanglement analysis in numerous cases involving state aid to sectarian schools. *See, e.g., Lemon* v. *Kurtzman, supra; Tilton* v. *Richardson, supra; Meek* v. *Pittenger, supra; Wolman* v. *Walter*, 433 U.S. 229 (1977). The Court has expressed disapproval of programs which necessitate governmental classification of church school activities as religious or nonreligious, which inject government into issues of religious discipline or into disagreements between teachers and religious authorities, or which create a sustained or detailed administrative relationship between government and church entities for enforcement of statutory or administrative standards. *See Committee for Public Education* v. *Regan*, 100 S. Ct. 840, 849-50 (1980); *Lemon* v. *Kurtzman, supra*, 403 U.S. at 618-20; *Walz* v. *Tax Commission, supra*, 397 U.S. at 657; *see also McCormick* v. *Hirsch, supra*, 460 F. Supp. at 1352.[27]

Federal appellate courts have applied the entanglement doctrine as developed by this Court to invalidate attempts to include church schools in regulatory schemes similar to that involved in the instant case. In *Catholic Bishop* v. *NLRB*, 559 F.2d 1112 (7th Cir. 1977), *aff'd on other grounds*, 440 U.S. 490 (1979), the Seventh Circuit held that the NLRB's proposed assumption of

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[27] A statute is invalid under the First Amendment if it creates "a reasonable likelihood or possibility of entanglement." Catholic Bishop v. NLRB, 559 F.2d 1112, 1126 (7th Cir. 1977) (collecting cases), *aff'd on other grounds*, 440 U.S. 490 (1979). *See also* McCormick v. Hirsch, *supra*, 460 F. Supp. at 1357. Moreover, the burden is upon the government to show that implementation of a regulatory scheme will *not* ultimately entangle it excessively in the affairs of a religion. Surinach v. Pesquera de Busquets, *supra*, 604 F.2d at 75-76.

jurisdiction over church elementary and secondary schools would violate the First Amendment because of the likelihood that it would propel the Board into analyses of essentially religious employment decisions. The court was also fearful that the prospect of NLRB review of employment decisions would chill the employers' free exercise rights. *Id.* at 1123-24. In rejecting the NLRB's assertion of jurisdiction over church schools, the court of appeals noted the unfortunate irony—also present in the instant case—that the government's position "is cruelly whip-sawing [church] schools by holding that institutions too religious to receive governmental assistance are not religious enough to be excluded from its regulation." *Id.* at 1119.

In *Surinach* v. *Pesquera de Busquets, supra,* the First Circuit invalidated a similar regulatory involvement in church elementary and secondary school affairs. The court refused to permit a government investigation of the costs of church schools as part of a broader investigation of the rising cost of education, stating that the proposed action "constitutes a palpable threat of state interference with the internal policies and beliefs of these church related schools." 604 F.2d at 76-77. The court recognized that the government's "ongoing powers necessary to ensure compliance with its orders and regulations, from compelling the keeping of records and the providing of testimony to the continuing inspection of papers and physical facilities . . . [have] the 'self-perpetuating and self-expanding propensities' which have alerted courts to an increased danger of an unconstitutional degree of entanglement." *Id.* at 78.

There is no doubt that the extension of state unemployment compensation laws to church elementary and secondary schools would create an intolerable degree of entanglement, as it has been defined by judicial authority. Under the Secretary's interpretation of section 3309(b)(1)(A), the critical factor in determining whether an employee's services are covered is the extent to which

those services constitute "strictly church duties performed . . . pursuant to church responsibilities." [28] Thus, in proceedings to determine the amount of taxes due from church schools, and in proceedings on individual claims for unemployment benefits, state officials would continuously be required to analyze the services of individual church school employees and to determine whether they do or do not constitute religious activity. For this reason, the United States District Court for the Central District of California condemned the classification required by the Secretary's interpretation, stating that

> the inquiry necessarily involved in policing the application of the exemption, "puts a public investigator into every classroom and entails a pervasive monitoring of these church agencies by the secular authorities." . . . Yet without such monitoring, there would be no way of making the determinations required by the Secretary's interpretation of § 3309. [*Grace Brethren Church* v. *California, supra*, slip op. at 11 (Sept. 21, 1979 decision) (quoting *Lemon* v. *Kurtzman, supra*, 403 U.S. at 627).[29]

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[28] UI Program Letter No. 39-78 (J.A. A-42). The Department of Labor has taken the position that if one-half or less of an employee's services are "strictly church duties," unemployment coverage must be provided for the employee. *See id.* (J.A. A-43).

[29] In *Grace Brethren* the court described one state auditor's attempt to comply with the Department of Labor's directive:

> The auditor, after asking detailed questions as to what transpired in the music class, the "nature center" and the "block center," ended by classifying music as strictly religious and the nature and block centers as both religious and secular. There is even a list of exempt employees which was given to one of the church schools at the conclusion of an audit. Among those listed was the church custodian. . . . One wonders how the auditor will determine the percentage of the custodian's time spent on the church versus the church school since the same buildings are frequently used for both purposes. [Slip op. at 20 n.11 (Sept. 21, 1979 decision).]

The South Dakota Supreme Court's statement that "the simple determination of the amount of time spent by employees working

The monitoring and oversight of services performed by church school employees to determine "whether different school activities are religious in character" unquestionably render the Secretary of Labor's interpretation of FUTA unconstitutional. *Committee for Public Education* v. *Regan*, *supra*, 100 S. Ct. at 849.[30]

Moreover, the extension of state unemployment compensation laws to church elementary and secondary schools would inject government into controversies of religious discipline and doctrine, necessitating inquiry into the religious understandings, motivations and good faith of church authorities responsible for operating church schools. The issue "most frequently disputed" in connection with claims for unemployment compensation is the reason for termination of employment. *California Department of Human Resources Development* v. *Java*, 402 U.S. 121, 126 (1971). This issue is extensively litigated because state laws uniformly provide for denial of benefits to employees who were discharged for "misconduct in connection with their work" or who voluntarily left employment "without good cause." [31]

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in respondents' schools, as opposed to its churches, does not foster entanglement of constitutional dimensions," 290 N.W.2d at 852, erroneously assumes that the critical factor for determining eligibility for coverage is the physical location where particular services are performed. The Secretary of Labor's own pronouncements have recognized that activities may be "strictly church duties" even though performed in school buildings. *See* Supplement #5—Questions and Answers Supplementing *Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976—P.L. 94-566* (Nov. 13, 1978) (Ala./Nev. J.A. 135).

[30] In *Regan* the Court upheld a limited state program for reimbursing certain state-imposed testing costs to church schools, noting that the program did not require the state "to monitor the day-to-day activities of the teaching staff, to engage in onerous, direct oversight, or to make on-site judgments from time to time as to whether different school activities are religious in character." 100 S. Ct. at 849 (quoting from the opinion of the district court).

[31] *See, e.g.*, Ala. Code §§ 25-4-78(2), (3); Nev. Rev. Stats. §§ 612.380, 612.385.

In cases involving dismissal of a teacher for conduct or teachings at variance with church doctrine, the teacher would have the right to demand that the underlying reason for the termination of employment be examined by the state unemployment agency. Federal law requires states to provide an "[o]pportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied." 42 U.S.C. § 503(a)(3). Hearings in such cases would necessarily involve review of religiously-motivated employment decisions of church officials, as well as inquiry into matters of church doctrine and practice.

A Department of Labor expert has acknowledged that evidence at such a hearing would consist of testimony from the teacher and church authorities concerning what they reasonably understood the doctrine of the church to be.[32] In addition, the state hearing officer would be required to appraise the credibility of the teacher and the church authorities [33] and to determine whether the teacher knowingly violated church doctrine.[34] Such hearings on unemployment claims would clearly violate constitutional prohibitions against excessive governmental entanglement with religion.

In advising the Secretary of Labor prior to this Court's decision in *NLRB* v. *Catholic Bishop*, *supra*, that the extension of state unemployment compensation laws to church elementary and secondary schools would not violate the First Amendment, the Solicitor of Labor argued:

> If a church official were to contend that an employee was in fact fired for espousing heretical views, the claims examiner would be limited to a determination whether the employer's alleged reason for the dis-

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[32] Transcript of Administrative Hearing in Alabama & Nevada v. Marshall, *supra*, dated Sept. 26, 1979, at 108-10, 113-14, 119-20 (Ala./Nev. J.A. 151-53, 156-57, 162-63).

[33] *Id.* at 113-14 (Ala./Nev. J.A. 156-57).

[34] *Id.* at 108 (Ala./Nev. J.A. 151).

> charge was the actual one. Once it is determined that the employee had not been removed or disciplined in an effort to interfere with rights created by the UI program, the inquiry would be at an end. If the employee had been discharged because of the employer's belief that the employee was unqualified to teach in a parochial school, the validity of that belief as a part of church doctrine would play no part in the decision. Concern by church officials that their decisions would be compromised by potential oversight in the claims process is speculative at best. . . .[35]

In the *Catholic Bishop* case, the Court disapproved a virtually identical inquiry into the religious motivations and understandings of church authorities who claim that certain employment actions were mandated by their religious creeds. The Court stated:

> [I]t is already clear that the Board's actions will go beyond resolving factual issues. The Court of Appeals' opinion refers to charges of unfair labor practices filed against religious schools. 559 F.2d, at 1125, 1126. The court observed that in those cases the schools had responded that their challenged actions were mandated by their religious creeds. The resolution of such charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but the very process of inquiry leading to findings and conclusions. [440 U.S. at 502.]

The same potential for chilling sensitive employment decisions of church authorities that existed in *Catholic Bishop* exists in this case as well. Church officials will be confronted with a choice of forgoing their right to discharge dissident teachers or of doing so "at the risk of

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[35] Clauss Memorandum (J.A. A-55 - A-56).

a protracted and expensive . . . proceeding . . . which would certainly in part involve the Church's religious policies and beliefs." *Catholic Bishop* v. *NLRB*, *supra*, 559 F.2d at 1124.

In addition to the particularly offensive types of official surveillance discussed above, the adoption of the Secretary's interpretation of FUTA would result in church school authorities being required to keep work records, open at any time to state inspection, on all persons performing service in the schools; to answer subpoenas issued by state officials in connection with claims for benefits as well as general administrative matters, under penalty of misdemeanor conviction or contempt citation; to respond to all claims for benefits with facts affecting the claim; and to participate in hearings required in conjunction therewith. The responsible state unemployment agencies will be required to make periodic determinations of the amount of unemployment contributions (or reimbursement) properly due from church schools. In so doing, the state agencies will be obligated to review church school records and to undertake an analysis of services performed in the schools. State agencies will be empowered to enforce the various obligations of church school authorities under the unemployment insurance program by such legal proceedings as the commencement of civil actions, property attachment, levies of assessment, liens on church assets, garnishment proceedings, and criminal misdemeanor prosecutions.[36] Such administrative entanglement between church school authorities and state agencies is far more severe than that which has been invalidated under the entanglement doctrine. *See e.g.*, *Surinach* v. *Pesquera de Busquets*, *supra*, 604 F.2d at 76-78.

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[36] *See* Ala. Exh. A at ¶¶ 78-85 (Ala./Nev. J.A. 66-72); Nev. Exh. A at ¶¶ 39-47 (Ala./Nev. J.A. 101-08).

Each of the types of excessive entanglement caused by the interpretation of section 3309 adopted by the Secretary of Labor and accepted by the Supreme Court of South Dakota represents a serious intrusion upon the quarantees of the Religion Clauses of the First Amendment and would in itself be fatal to the Secretary's interpretation. However, this Court need not consider each of these types of entanglement in isolation. In determining the constitutionality of the Secretary's interpretation, the "cumulative impact of the entire relationship" between church and state must be measured. *Lemon* v. *Kurtzman, supra,* 403 U.S. at 614. It is evident that the cumulative impact of the entire relationship created by the extension of unemployment compensation laws to church schools as required by the Secretary is a comprehensive, continuing, and active state surveillance of, and involvement in, church affairs. The First Amendment forbids such a result.

CONCLUSION

The interpretation of section 3309(b)(1) of FUTA endorsed by the Supreme Court of South Dakota flatly ignores the plain language of the statute, has no support in legislative history, and transgresses fundamental constitutional guarantees. The State of Alabama and the State of Nevada accordingly request this Court to reject the Secretary of Labor's interpretation of FUTA and to reverse the decision of the Supreme Court of South Dakota.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief of the States of Alabama and Nevada as Amici Curiae in Support of Petitioners were served this 18th day of December, 1980, by mail, postage prepaid, on Edward Thomas Schilling, Esq., 757 North Broadway, Suite 500, Milwaukee, Wisconsin 53202, counsel for Petitioners; Judith A. Atkinson, Esq., Assistant Attorney General, Office of Attorney General, State Capitol, Pierre, South Dakota 57501, counsel for Respondent; and Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530, counsel for the United States as amicus curiae.

ALLEN R. SNYDER

No. 80-120

IN THE

Supreme Court of the United States

October Term, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH and NORTHWESTERN LUTHERAN ACADEMY,

Petitioners,

v.

THE STATE OF SOUTH DAKOTA,

Respondent.

On Writ of Certiorari to the Supreme Court of South Dakota

MOTION OF THE AMERICAN JEWISH CONGRESS FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE AMERICAN JEWISH CONGRESS, *AMICUS CURIAE*

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QUESTION PRESENTED

Is a governmental system of unemployment compensation under which "churches" are exempt from coverage, but "church-related schools" are not, consistent with the mandates of the Religion Clauses of the First Amendment?

No. 80-120

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH and NORTHWESTERN LUTHERAN ACADEMY, Petitioners,

v.

THE STATE OF SOUTH DAKOTA, Respondent.

On Writ of Certiorari to the Supreme Court of South Dakota

Motion For Leave To File Brief Amicus Curiae

The undersigned, as counsel for the American Jewish Congress, respectfully moves this Court for leave to file the

accompanying brief amicus curiae in support of the petitioners. Pursuant to Rules 36 and 42, the parties' consent to the filing of the attached brief was sought. Counsel for petitioners consented to the filing of the brief, but counsel for respondent, The State of South Dakota, refused to do so.

The American Jewish Congress is a national organization of American Jews founded in 1918. Among its major concerns are the preservation and protection of the unitary freedoms secured by the Free Exercise and Establishment Clauses of the Constitution of the United States. We seek permission to file this brief because we believe that the decision of the Supreme Court of South Dakota fundamentally undermines the values inherent in, and the

protections afforded by, the Religion Clauses of the Constitution.

The American Jewish Congress has participated in a large number of church-state cases before this and other courts. It believes that its deep commitment to the First Amendment and its accumulated experience in this field permits it to make a unique contribution to the discussion of the Constitutional issues involved in this case.

Respectfully submitted,

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No. 80-120

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v.

THE STATE OF SOUTH DAKOTA, Respondent.

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Brief of The American Jewish Congress, Amicus Curiae

QUESTION PRESENTED

Is a governmental system of

unemployment compensation under which "churches" are exempt from coverage, but "church-related schools" are not, consistent with the mandates of the Religion Clauses of the First Amendment?

DECISIONS BELOW

The opinion of the Supreme Court of South Dakota, reported at 290 N.W.2d 845 (S.D. 1980), appears in the Appendix, (Appendix A, pp. A1-A24). The opinion of the Circuit Court, Sixth Judicial Circuit of South Dakota, not reported, appears in the Appendix (Appendix B, pp. A25-A34). The opinion of the hearing officer for the South Dakota Department of Labor Unemployment Insurance Division, not reported, also appears in the Appendix (Appendix C, pp. A35-A45).

JURISDICTION

The judgment of the Supreme Court of South Dakota was entered on March 26, 1980. A timely petition for rehearing was denied by oral order on May 2, 1980. Certiorari was granted on November 3, 1980. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3) (1970).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment, provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

The relevant provisions of 26 U.S.C. § 3309(a) (1970), as it existed

prior to the Unemployment Compensation Amendment Act of 1976, Pub. L. No. 94-566, § 115, 90 Stat. 2670, which in effect, repealed Sec. 3309(a)(3) (1970), are as follows:

> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches.
>
> (2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order.
>
> (3) in the employ of a school which is not an institution of higher education.

The relevant provisions of the South Dakota statutes, S.D. Compiled Laws Ann. §61-1-10.4, adopted to conform to federal law, as it existed prior to January 1, 1978 (before repeal of S.D. Compiled Laws Ann. §61-1-10.4(3) are as follows:

> (1) In the employ of
>
> (a) a church or convention or association of churches, or
>
> (b) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches; or
>
> (2) By a duly ordained, commissioned or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the

> exercise of duties required by such order; or
>
> (3) In the employ of a school other than a state school which is not an institution of higher education;
> ....

Statement of the Case

Petitioners St. Martin Evangelical Lutheran Church and Northwestern Lutheran Academy seek reversal of the decision of the South Dakota Supreme Court holding Northwestern Lutheran Academy ("Lutheran Academy") and St. Martin's Evangelical Lutheran School ("St. Martin's School") liable for payment of unemployment compensation taxes.

Before January 1, 1978, Section 3309(b) of the Federal Unemployment Tax Act ("FUTA") permitted states to exempt

certain services from unemployment compensation taxation. These exemptions were codified in a parallel state law, South Dakota's Sec. 61-1-10.4, which provided that covered employment did not include services performed:

(1) In the employ of

(a) a church or convention or association of churches, or

(b) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches; or

(2) By a duly ordained, commissioned or

> licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or
>
> (3) In the employ of a school other than a state school which is not an institution of higher education; ....

In 1976 Congress amended FUTA, P.L. 94-566, to eliminate the subsection (3) exemption, and, as required by that amendment, South Dakota in effect repealed subsection (3) of SDCL 61-1-10.4. The remainder of SDCL 61-1-10.4 remained intact.

In April, 1978, the Secretary of Labor determined that, in light of the repeal of § 3309(b)(3), church-related schools were not exempt from state unemployment tax. According to the Secretary, the repeal by Congress of the Section

3309(b)(3) exclusion was clearly intended to result in State coverage of church related schools. In his view, the only services performed in the schools that might reasonably be considered within the scope of the exclusion permitted by 3309(b)(1) are those strictly church duties performed by church employees pursuant to their church responsibilities within the school.

The Secretary's opinion resulted in a directive issued to the states requiring them to assess unemployment compensation taxes against church-related schools. In order to continue its participation in FUTA, the State of South Dakota issued a determination that both the Lutheran Academy and St. Martin's School were employers subject to coverage by the South Dakota

unemployment insurance law. The petitioners appealed.

An Appeals Referee found that petitioners are members of the Wisconsin Evangelical Lutheran Synod. The Synod's purpose is to "extend and conserve the true doctrine and practice of the Evangelical Lutheran Church." One of its means for accomplishing this purpose is the establish[ment] and maint[enance of] theological seminaries, colleges, academies, schools and other institutions." According to the Synod, the training of youth involves both education and religion and, according to the Synod, the two are so closely intertwined that they are inseparable. School programs are operated in accordance with these beliefs.

St. Martin's School is operated by

St. Martin Evangelical Lutheran Church, a member of the Synod. The school is state certified and offers education in kindergarten through the eighth grade. Overall supervision over the school is exercised by a Board of Education elected from and by the local congregation. The school is wholly financed by this local congregation and is not a separate entity from the church. Its paid staff includes two male teachers, considered ministers by the Synod; four female teachers, also deemed part of the ministry by the Synod but, unlike the males, barred from taking part in sacerdotal functions and from voting on Synod matters; as well as three other employees, one of whom also works at St. Martin Evangelical Lutheran Church. All education courses offered at St.

Martin's School are taught from a religious viewpoint based on the scriptural convictions of the Wisconsin Evangelical Lutheran Synod.

Northwestern Lutheran Academy is one of four academies maintained by the Synod to provide secondary education to individuals who intend to enter the Church's ministry. The Synod not only is the Academy's principal source of financial support, but controls its operation and policy. The Academy has two goals -- to recruit and train prospective workers in the preaching and teaching ministry and to make available a Christian education on the secondary level. Approximately 46 percent of its graduates become teachers or pastors. Courses offered at the Academy are also taught from a religious viewpoint.

Nevertheless, the Appeals Referee concluded that, while the Academy and St. Martin's School are operated, supervised, controlled, and principally supported by a church or convention of churches, their primary purpose is education, not religion, and, thus, they are not exempt from FUTA coverage. He further determined that pastors performing services in the church schools, as well as the school's male teachers, were exempt from coverage under the statutory provision, SDCL 61-1-10.4(2), exempting any duly ordained, commissioned or licensed minister of the church in the exercise of his ministry. Because female teachers were not vested by the Synod with ministerial status, their services were held not exempt. The Referee rejected the school's claim that their inclusion in the

unemployment compensation scheme unconstitutionally entangled church and state.

The Circuit Court of the Sixth Judicial District, Hughes County, reversed. It held that SDCL 61-1-10.4(b)(1), exempting services performed in the employ of an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church, rendered the schools exempt from taxation and that Congress' repeal of the subsection (3) exemption for non-public schools did not affect the "primarily for religious purposes" exemption. The court did not reach the constitutional question.

The Supreme Court of South Dakota again reversed, one justice dissenting. It ruled that Congress, in repealing the

exclusion from unemployment compensation taxes for private schools intended to include church-related schools within the scope of the Act. The court held that the Secretary's interpretation was consistent with Congressional intent, and that, whatever burdens were placed on parochial schools were justified by compelling governmental interests. It held, in addition, that the statute did not unduly entangle church and state. Finally, it held that, while the school's male teachers were exempt, the female teachers were not.

Argument

A GOVERNMENTAL SYSTEM OF UNEMPLOYMENT COMPENSATION UNDER WHICH "CHURCHES" ARE EXEMPT FROM COVERAGE, BUT "CHURCH-RELATED SCHOOLS" ARE NOT, IS INCONSISTENT WITH THE MANDATES OF THE RELIGION CLAUSES OF THE FIRST AMENDMENT

The American Jewish Congress believes that the plain language of the statutory provision exempting from FUTA coverage all organizations operated primarily for religious purposes which are operated, supervised, controlled or principally supported by a church or convention or association of churches exempts the petitioners and all other church-related schools from the Act's coverage. Since the language is clear, no resort to Congressional intent need be had. See State of Alabama v. Marshall, 626 F.2d 366 (5th Cir. 1980).

Alternatively, if this Court finds the statutory language ambiguous, we suggest that, since Congress was silent as to its intention to include or exclude church-related schools within the coverage of

FUTA, and since inclusion presents a "significant risk" that the First Amendment's entanglement bar will be breached, National Labor Relations Board v. Catholic Bishop of Chicago, 440 U.S. 490, 502 (1979), this Court should construe the Act to exclude religious schools and thereby avoid the sensitive First Amendment issues which would otherwise arise.

But, if this Court should reject those two claims, then the American Jewish Congress respectfully urges that the statutory scheme be declared unconstitutional.

Our theory of unconstitutionality is a simple one. We believe that Congress might, consistent with the First Amendment, impose unemployment tax liability on all religious institutions, including churches (qua houses of worship) and church-related

schools. If such a scheme were enacted, the costs and burdens imposed on religious institutions, we believe, would be justified by the compelling governmental interest in providing financial assistance to those who are unemployed through no fault of their own. So long as it were administered so as to minimize governmental entanglement in church affairs, a statutory compensation scheme which included both churches and church schools within its ambit would be constitutional.

But this is not the unemployment compensation scheme with which this Court is faced. "Churches" are unequivocally excluded from coverage. Having decided to exclude churches from FUTA coverage, Congress may not then mandate inclusion of church-related elementary and secondary

schools. The First Amendment will not tolerate the drawing of that line, for the attempt to distinguish between the two necessarily leads to excessive entanglement.

The decisions of this Court consistently and correctly recognize that church-related primary and secondary schools are an integral part of the church. This Court, in Meek v. Pittenger, 421 U.S. 349, 366 (1975), in striking down state funds for certain auxiliary services in church-related elementary and secondary schools, described the relationship succinctly:

> The church-related elementary and secondary schools that are the primary beneficiaries of Act 195's instructional material and equipment loans typify such religion-pervasive institutions. The very purpose of many of those schools is to provide an integrated secular and religious

> education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. See Lemon v. Kurtzman, 403 U.S., at 616-617, 91 S.Ct., at 2113.... "[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined." Id. at 657, 91 S.Ct., at 2133 (opinion of Brennan, J.). See generally Freund, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680, 1688-1689.

Justice Stevens, concurring and dissenting in Wolman v. Walter, 433 U.S. 229, 265 (1977), quoted the language set out above while observing that a sectarian school's mission "at heart is religious" and "the sectarian school itself, not the legislation ... is 'entangled with religion.'" See also Tilton v. Richardson, 403 U.S. 672 (1971) (recognizing signifi-

cant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools).

Religious groups "maintain schools that plainly tend to assure future adherents to a particular faith by having control of their total education at an early age. No religious body would deny this is an affirmative, if not dominant policy of church schools." Walz v. Tax Commission, 397 U.S. 664 (1970). Under these circumstances, the distinction between a church and a church-related school is a wholly improper one. The factual record in this case bears this out completely.

As set forth in greater detail in the Statement of the Case, St. Martin Evangelical Lutheran Church, of which St.

Martin's School is a part, and the Lutheran Academy are members of the Wisconsin Evangelical Lutheran Synod. The Synod's purpose is to extend and conserve the true doctrine of the Evangelical Lutheran Church. It does so, in part, through the establishment and operation of schools, the existence of which rests on a theological base and the operation of which is in accord with that theological base. School programs are operated in accordance with those religious beliefs and educational courses are taught from a religious viewpoint. The teachers at St. Martin's School and the Lutheran Academy, both male and female, are deemed by the church to be members of its ministry.

The close relationship between the schools and the "church" -- indeed the

identity between the schools and the church which makes the attempted description of them as separate entities impossibly circular (one being necessarily defined in terms of the other) -- is not unique to Evangelical Lutheran institutions. The relationship between "church" and church-related schools in other denominations is similarly intertwined. A few examples will suffice to make this clear.

> Roman Catholic elementary and secondary schools are operated and controlled by the Bishop of the Diocese, have no separate corporate existence, were founded for religious reasons and teach otherwise secular subjects with religious content. Principals are priests, subject to direct control of the appropriate parish priest. Student participation in religious exercises is an integral part of the curriculum. Operating funds are derived principally from church members. Only 3-5% of the lay teachers are non-Catholic. Teachers are

employed by the principal and parish priest, are paid by the Diocese, teach subjects with religious content and perform religious duties, and are subject to discharge for not fulfilling the Church's religious mission.

Baptist churches are tax-exempt corporations whose members are fundamental Bible believers. Its day schools are considered as integral and functional parts of the church, occupy the same facilities as the church, are controlled and supported by the maintaining church. Superintendents are ordained ministers or graduates of religiously oriented colleges. Religious instruction is mandatory, "secular" subjects are taught in conformity with church doctrine, textbooks are published by religious institutions and operating funds are derived from the church budget. Teachers are either ordained ministers or other certified individuals, are hired by the superintendent and pastor, are subject to discharge for breach of religious doctrine and must be members of the church.

United States Department of Labor v. State of Alabama, Recommended Decision of William A. Gershuny, ALJ, Joint Appendix, A-19, A-25.

In short, these schools are a ministry of the church. They are part of the church and inseparable from it. And the Constitution requires that the government recognize this identity.

The First Amendment requires that the term "church" be given the most inclusive and all-embracing definition. In Appeal of Stark, 72 Pa. D. & C. 168 (1950), a case involving a religious order's claim of entitlement to an occupancy permit allowing it to use one of its buildings as sleeping quarters for retreatants, those opposing the granting of the permit contended that the building, if used that way,

was not a church within the meaning of the zoning ordinance. The court rejected the contention, stating that the ordinance would be constitutional only if the term "church" were defined broadly:

> It is not within our province to define what is or is not a church. The framers of the ... ordinance wisely omitted to supply such a definition. What may be a sacred religious building to one denomination or religious sect may not meet the test of another denomination or group. We could define a "church" as a "building set apart for public worship," or "a place of worship of any religion" (Webster's New International Dictionary, 2nd ed.), or could quote the definition contained in canon 1161 of the Roman Catholic Church as "a sacred edifice dedicated to divine worship, especially with a view to enabling all the faithful to practice public worship."
>
> Justice Frankfurter in his dissent in West Virginia State Board of Education et al. v.

> Barnette et al., 319 U.S. 624, says "it is unnecessary to attempt a definition of religion." We believe that such a definition -- if, as the term would indicate, it is to be a definitive delineation and is to control our future decisions -- would be harmful and a danger to religious freedom.

Id. at 179-80.

The artificiality and unworkability of the attempted distinction between church and church school is highlighted by the peculiar result reached by the Supreme Court of South Dakota in this case with respect to the exemption of male, but not female, teachers at St. Martin's School and at the Lutheran Academy. Section 3309(b)(2), corresponding to SDCL 61-1-10.4(2), exempts from coverage services performed "by a duly ordained, commissioned, or licensed minister of a church in the

exercise of his ministry." In the instant case, petitioners maintained, and the Appeals Referee found as fact, that male and female teachers are considered part of the church's ministry. Nevertheless, because under church doctrine male teachers, but not female teachers, may perform sacerdotal functions and vote on Synod matters, all of the schools' male teachers were ruled exempt from coverage under the "minister" exception of 3309(b)(2). A "church" which is organized slightly differently and which makes no sex-based distinctions among members of its ministry would, under this rule, have all of its teaching employees exempt from FUTA coverage. The operation of the rule, turning as it does solely on the particularities of a church's doctrinal precepts, definition of its ministry and

assignment of particular roles -- all of which are fundamentally religious -- to its members makes manifest the strained and artificial nature of any attempt by the state to dissect a church and to fit its pieces into nice categories.

The highly artificial distinction the Secretary's interpretation seeks to impose is even more clearly shown by focusing on the Section 3309(b)(1) exemption which, in the church-related school context, according to the Secretary, excludes from covered services "strictly church duties performed by church employees at the schools pursuant to their church responsibilities." What is the church -- the Evangelical Lutheran Church, the Synod, St. Martin Evangelical Church? If "church" as used here means "house of worship," as the

Secretary and the Supreme Court of South Dakota appear to suggest, it is difficult to make any sense out of the Secretary's interpretation. Under that test, St. Martin Evangelical Church is probably a "church," but what about the Synod, which runs the Lutheran Academy or the "Evangelical Lutheran Church." What, indeed, is a strictly "house of worship" duty? What is a "house of worship" responsibility performed at a school? Who is a "church" employee, as opposed to a school employee, when the "church" and the "school," like St. Martin's School and St. Martin Evangelical Lutheran Church are not separate entities? When is a duty performed at the school, and not at the church, when, as is often the case, the "church and the school are housed in the same building?

The only way sense can be made of this provision is by recognizing the wholeness and integrity of the church in its largest sense, as a community of worshippers carrying out a perceived religious mission through a variety of ministries, often including educational ones.

> A church is more than merely an edifice affording people the opportunity to worship God. Strictly religious uses and activities are more than prayer or sacrifice and all churches recognize that the area of their responsibility is broader than leading the congregation in prayer.... To limit a church to being merely a house of prayer and sacrifice would, in a large degree, be depriving the church of the opportunity of enlarging, perpetuating and strengthening itself.

Matter of Community Synagogue v. Bates, 1 N.Y.2d. 445, 453, 154 N.Y.S.2d 15, 21-22, 136 N.E.2d 488, 493 (1956). See also

Twin City Bible Church v. Zoning Board of Appeals, 50 Ill. App. 3d 924, 8 Ill. Dec. 919, 365 N.E.2d 1381 (1977); Beit Havurah v. Zoning Board of Appeals, 177 Conn. 440, 481 A.2d 82 (1979); Annot., "What Constitutes 'Church,' 'Religious Use,' or the Like Within Zoning Ordinance," 62 A.L.R.3d 197 (1975). A church is not merely a house of worship. And a church-school is not something apart from the church, but rather a part of it.

Any other reading necessarily treats religious organizations on the basis of artificial and arbitrary lines drawn according to preconceived notions of what a church is, how it should be structured, and how it should define and pursue its mission. That the Constitution does not countenance.

Conclusion

For the reasons set forth above, the American Jewish Congress, amicus curiae, respectfully urges that, if this Court determines that the statutory scheme exempts "churches" but includes church-related schools, the Court declare the statute unconstitutional, as violative of the Religion Clauses of the First Amendment.

Respectfully submitted,

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No. 80-120

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH and NORTHWESTERN LUTHERAN ACADEMY,
Petitioners,

v.

THE STATE OF SOUTH DAKOTA,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of South Dakota

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS AMICUS CURIAE AND MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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---

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Americans United for Separation of Church and State respectfully moves this Court for leave to file the accompanying Brief in this case as Amicus Curiae. The consent of the Attorney for the Petitioner herein has been obtained but Counsel for Respondent has refused to consent to the filing of a Brief by Americans United for Separation of Church and State as Amicus Curiae.

The applicant, Americans United for Separation of Church and State, has an interest in this case in that it is the only national interfaith organization dedicated exclusively to defending religious liberty and the constitutional principle of church-state separation. Americans United for Separation of Church and State has been involved in many of the major cases reaching this Court concerning the application of the religion clauses of the First Amendment to the United States Constitution.

The Amicus Curiae brief directs its attention to the application of the Federal Unemployment Tax Act as adopted by the State of South Dakota to church elementary and secondary schools. The Amicus brief claims that the entanglement question, which was given birth in establishment cases, is equally applicable to free exercise cases. This Amicus has consistently sought judicial aid to prevent public funding of sectarian elementary and secondary schools. Americans United for Separation of Church and State argues here that the greatest amount of independence consistent with the Least Intrusive Alternative/Compelling State Interest Test as announced in *Sherbert* v. *Verner,* 374 U.S. 398 (1963), should be reserved for church-operated elementary and secondary schools.

Respectfully submitted,

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BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

Americans United for Separation of Church and State is a nonprofit corporation formed to maintain and advance civil and religious liberties through enforcement of the rights and privileges granted by the First and Fourteenth Amendments to the Constitution of the United States.

Americans United is governed by a board of Trustees composed of members of many religious organizations

as well as individuals who are members of no religious body but who are concerned with the preservation of the separation of church and state. It is an organization with some 40 thousand members of various religious beliefs and of no religious belief in all states of the United States, including the State of South Dakota. Americans United is involved in litigation of First Amendment free exercise and establishment issues throughout the United States.

Americans United for Separation of Church and State has been involved in many of the major cases coming before this Court dealing with the First Amendment to the United States Constitution, including such cases as *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971); *Committee for Public Education and Religious Liberty* v. *Nyquist,* 413 U.S. 756 (1973); and *Meek* v. *Pittenger,* 421 U.S. 349 (1975).

Americans United for Separation of Church and State is particularly interested in the issues raised in this case because although this organization is firmly committed to the preservation of the principles embodied in the establishment clause of the First Amendment and has opposed public funding of church-operated elementary and secondary schools, it believes that the free exercise clause correspondingly guarantees freedom from state intrusion into church-operated school affairs. The brief of this Amicus Curiae will argue that the application of the Federal Unemployment Tax Act, as adopted by the State of South Dakota, to church elementary and secondary schools, violates the religion clauses of the First Amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT

If the decision of the Supreme Court of the State of South Dakota is sustained, every church operating parochial schools in that state will be subject to a judicial probing of its doctrines, teachings and government in any hearing involving the application of the state's unemployment compensation act as it relates to employees of a church working within the confines of the church-operated school. Such inquiry touches the very core of the constitutional guarantee against religious establishment. It is not only the conclusion that may be reached which may impinge upon the constitutional rights of the church, but the very process of the inquiry leading to findings and conclusions impinges upon the constitutional rights of the church.

There must be close scrutiny of the degree of entanglement existing when there is state involvement with religious institutions, but this inquiry should not merely relate to actual interference but also must concern the potential for an appearance of interference with religion.

Of great concern is the state Supreme Court's implication that the state has the right to cleave the school from the church and determine what the ministry of a church will include. Education historically has been an integral part of many a church's ministry and is entitled to the same constitutional protection as other parts of the total eccesiastical program of the church.

The free exercise clause forbids the state to inhibit the freedom of choice between public and parochial education. The state should not limit the liberty of parochial schools in the carrying out of their sacred role, and public education should be free from sectarian

pressures. The role of government in dealing with parochial school operations should be narrowly limited.

The Least Intrusive Alternative/Compelling State Interest Test announced in *Sherbert* v. *Verner,* 374 U.S. 398 (1963), is applicable to free exercise cases involving government intrusion into church affairs. Because the statute here at issue and the administrative agency's application constitute a burden on the free exercise of religion and pose a threat of entanglement, the government must show that some compelling state interest justifies the burden imposed and in addition must demonstrate that there is no less restrictive alternative available. The state has failed to meet the requisite showing under this Test.

In balancing the interests of the state against the constitutional rights of the church, it is proper to consider the financial impact on the church and its ability to provide sectarian education if the church-operated schools are subject to the unemployment insurance requirements of the state statute. The historical role of a church in education is also an important factor which may be a part of any balancing of state and ecclesiastical interests.

The Court should be ever sensitive of the special role that sectarian education plays in the mission of many churches. For this reason, there should always be great reluctance to permit a government agency to involve itself in the educational ministry of any church.

The application of the unemployment insurance program of the State of South Dakota in a manner bringing part of the employees of church-operated schools within the ambit of the Act violates the religion

clauses of the First Amendment to the United States Constitution.

ARGUMENT

THE APPLICATION OF THE FEDERAL UNEMPLOYMENT TAX ACT AS ADOPTED BY THE STATE OF SOUTH DAKOTA TO CHURCH ELEMENTARY AND SECONDARY SCHOOLS VIOLATES THE RELIGION CLAUSES OF THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Before us is the decision of the Supreme Court of South Dakota, which reversed the judgment of the state's circuit court and reinstated the decision of the appeals referee. Reference must be made to the appeals referee's decision to understand the full impact of this decision and its violative effect on the First Amendment. The referee made findings of fact which unquestionably bring this secondary school within the type of schools that this Court has held to be pervasively sectarian (*see* Findings of Fact, Appendix A, pp. A36-40).

The problem before the appeals referee arose out of an interpretation of the effect of a repealed subsection of the Federal Unemployment Tax Act (FUTA), which is mirrored in the South Dakota statutes adopted to conform to FUTA. Prior to the congressional amendment to FUTA in 1976, both the federal and state statute provided for exemptions from coverage under the unemployment law. The law excepted employment services performed:

1) in the employ of

   a. a church or convention of churches, or

   b. an organization which is operated primarily for religious purposes and which is operated,

supervised, controlled or principally supported by a church or convention or association of churches; or

2) by a duly ordained, commissioned or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order; or

3) in the employ of a school other than a state school which is not an institution of higher education; . . . .

In 1976 Congress repealed the third exemption set forth above but left the other two statutory exemptions intact. The state contends that even though an employee is an employee of a church organization he is not an exempt employee if he happens to teach in a school operated by the church.

The appeals referee in this case determined, and the state Supreme Court by its reinstating decision also ruled, that all of the pastors of the St. Martin Evangelical Lutheran Church who perform services in the academy, as well as all male teachers, were exempt from coverage, but female teachers were not exempt. This apparent illogical result came about as a result of the twisted logic of the referee and Court majority. The referee, in reviewing the church doctrines, teachings and polity, concluded that the male teachers had "equal status" (with pastors) in the church in many respects, including receipt of a divine, life-long call, authorization to vote on Synod matters, and ability to perform the sacerdotal functions of the church (Appendix C, p. A44.

The appeals referee, however, discarded the protestations of the church and held that the female teachers

were not exempt like their brother teachers. The referee reasoned that the phrase "ordained, commissioned or licensed" is interpreted to mean "being vested with ministerial status in accordance with the procedure followed by the particular church denomination." He ruled: "The female teachers do not have this status as the Scriptural position of the Synod prevents them from voting on Synod matters, which pastors and male teachers can do, and from performing the sacerdotal functions of the Church." (Appendix C, p. A44).

Apparently it was not important to the appeals referee that he had specifically found that "The Synod also has female teachers whom they consider part of the ministry. The female teachers have responsibilities equal to that of male teachers, receive identical training, and also receive a divine, life-long call. . . ." (Findings of Fact No. XI, Appendix C, p. A38).

Under the method used by the appeals referee, a church would be subject to a judicial probing of its doctrines, teachings and government. This type of inquiry touches the very core of the constitutional guarantee against religious establishment. *State of New York* v. *Cathedral Academy,* 434 U.S. 125 (1977).

The dissenting opinion of the state Supreme Court also pinpoints a problem pregnant with serious entanglement potential. (Appendix A, pp. A22 & 23). A church-operated school would face the prospect of proving that an employee was discharged because of a violation of church doctrine instead of a budgetary layoff. Such a hearing would involve the question of whether the teacher did or did not teach contrary to Synod doctrine or on what basis, according to doctrinal standards, the employee's actions constituted miscon-

duct. One cannot even imagine the scope of such an inquiry, but the hearing officer might well be required to decide what the teachings of the church are and whether the church administrators follow their own teachings. Inquiry might veer even into the impossible area of how central to the beliefs of the church a policy provision is and whether the church policy is a religious teaching or only administrative fiat. This is exactly the kind of excessive entanglement the courts have been reluctant to countenance.

When the state must make inquiry as to whether an employee was terminated for misconduct or for other reasons, it is not only the conclusion that may be reached which may impinge upon the constitutional rights of the church, but the very process of the inquiry leading to findings and conclusions. *NLRB* v. *Catholic Bishop of Chicago,* 440 U.S. 490, 99 S.Ct. 1313, 1320 (1979).

This Court has declared that it will "not tolerate either governmentally established religion or governmental interference with religion." *Walz* v. *Tax Commission of City of New York,* 397 U.S. 664 (1970). In *Walz,* this Court recognized the importance of charting a judicial course "that preserved the autonomy and freedom of religious bodies while avoiding any resemblance of established religion." It emphasized the necessity of clearly examining governmental actions to see if the government thereby becomes excessively involved in the affairs of the church. *Id.* at 672.

In a footnote to its opinion in *Roemer* v. *Maryland Public Works Board,* 426 U.S. 736, 748, n.15 (1976),

this Court refers to *Walz* in a way relevant to the present inquiry:

> The importance of avoiding persistent and potentially frictional contact between governmental and religious authorities is such that it has been held to justify the *extension,* rather than the withholding of certain benefits to religious organizations. The Court upheld the exemption of such organizations from property taxation partly on this ground.

Thus, this Court has recognized that potentially frictional contact can best be avoided by exempting churches from taxation.

In *Lemon* v. *Kurtzman,* 403 U.S. 602, 614 (1971), this Court called for the close scrutiny of the degree of entanglement when there is state involvement with religious institutions. Specifically, it stated that the "objective is to prevent, as far as possible, the intrusion of either into the precincts of the other."

In *Allen* v. *Morton,* 459 F.2d 65 (D.C. Cir. 1973), the court suggested that government involvement with religion should be kept to a minimum and that not only actual interference, but the "potential for and appearance of interference with religion," should be avoided. *Id.* at 75.

It has long been recognized that the First Amendment needs breathing space and that statutes which burden the exercise of First Amendment rights must be carefully drawn. *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960). The statute in question, as interpreted by the State of South Dakota, fails to avoid excessive entanglement between church and state.

In this case we have a subtle type of governmental intrusion, which is perhaps the most pernicious of all. As pointed out in the dissenting opinion of the state Supreme Court, "Appellants are attempting to cleave the school from the church." (Appendix A, p. A21).

Today one of the great concerns sweeping ecclesiastical circles is the attempt of government to define the mission of the church. To determine what in the judgment of a bureaucrat is religious and what is secular, to determine what lies within the ministry of the church, the state so often has attempted, by definition, to delete from ecclesiastical concern functions which have been historically a function of the church. *See Espinosa* v. *Rusk,* —— F.2d ——, 49 U.S.L.W. 2311 (10th Cir. Oct. 21, 1980).

One California Supreme Court Justice, in a dissenting opinion, astutely observed that freedom of "religious thought and action cannot be whittled away by carving out segments of religious activities and relegating them to the realm of secular affairs. If that were permitted, the right or action for a religious purpose could eventually be destroyed by the gradual severance and classification as secular of every activity undertaken to promote religious purpose." *Gospel Army* v. *City of Los Angeles,* 163 P.2d 704, 719 (1945).

Education historically has been an important and integral part of religious ministry and is an integral part of the Judeo-Christian religious tradition. A canon attributed to the Sixth Ecumenical Council of Constantinople in 680-81 A.D. requires priests to maintain schools for children. J. Bingham, *The Antiquities of the Christian Church,* book 8, ch. 7, § 12 (1856). In this country several denominations spend

large portions of their church funds for the educational ministry of the church, providing a sectarian education to its young. As this Court noted in *Meek* v. *Pittenger*, 421 U.S. 349, 366 (1975), "The very purpose of many [sectarian] schools is to provide an integrated secular and religious education; the teaching process, is, to a large extent, devoted to the inculcation of religious values and beliefs."

If a church-operated school is an integral aspect of the church ministry, it is entitled to the same constitutional protection as other parts of the ecclesiastical program of the church. It has been suggested that the free exercise clause forbids the state to inhibit the freedom of choice between public and parochial education, either by restricting the liberty of private schools through governmental action or jeopardizing the freedom of public schools from sectarian pressures. *School District of Abington* v. *Schempp*, 374 U.S. 203, 242 (1963) (Brennan, J., concurring opinion).

If we accept this concept that the state should not limit the liberty of parochial schools in the carrying out of their role of inculcating religious values, and public education is to be free from sectarian pressures, then the role of government over parochial schools should be narrowly limited.

In *Sherbert* v. *Verner*, 374 U.S. 398 (1963), this Court introduced the Least Intrusive Alternative/ Compelling State Interest Test for application in cases where free exercise rights come in conflict with state concerns. In *Sherbert* this Court made clear that every governmental interest would not overbalance a free exercise claim. The interest must be shown to involve a grave and paramount state concern. *Id.* at 405. Under

this balancing test, the burden is upon the state to establish: 1) that there is a compelling governmental interest involving a paramount state interest and 2) the absence of any less intrusive means whereby the state may carry out any such vital state objective.

Although this Court's concern about "excessive entanglement" originated in establishment cases [*Lemon* v. *Kurtzman, supra; Levitt* v. *Committee for Public Education,* 413 U.S. 472 (1973); *Sloan* v. *Lemon,* 413 U.S. 825 (1973); *Meek* v. *Pittenger, supra; Wolman* v. *Walter,* 433 U.S. 229 (1977)], it should be equally applicable to free exercise cases because it goes to the core of the principle deductible from the religion clause decisions that the Court "will not tolerate either governmentally established religion or governmental interference with religion." *Walz* v. *Tax Commission of City of New York, supra* at 669.

Because the statute here at issue and the administrative agency's action herein complained of are both burdens on the free exercise of religion and pose a threat of excessive entanglement, the government must show that some compelling state interest justifies the burden imposed and in addition must demonstrate that there exists no less restrictive or entangling alternative. *Surinach* v. *Pesquera de Busquets,* 304 F.2d 73, 79 (1st Cir. 1979).

The majority opinion of the state Supreme Court in the instant case attempts to address this issue, stating that:

> Further, coverage of parochial school employees under the unemployment compensation law is permissible because it is justified by a compelling governmental interest. This interest is to provide a system of income maintenance for unemployed

> individuals so that they have the resources for food, shelter, and other necessities of life until they are able to secure other employment.

(Appendix A, p. A11). This comment, however, misses the mark. The state cannot meet the burden imposed by *Sherbert* by simply asserting the existence of some generally recognized interest which the state has over the subject matter. As Professor Lawrence Tribe has stated:

> In applying the least intrusive alternative-compelling interest requirement, it is crucial to avoid the error of equating the state's interest in denying an exemption with the state's usually much greater interest in maintaining the underlying rule or program for unexceptional cases. Only the first interest—that in denying an exemption—is constitutionally relevant when an exemption is sought.

Tribe, *American Constitutional Law* 855 (1978).

The state has failed to meet the requisite showing. In fact, by its own interpretation of the existing statute, a substantial number of the teachers are, in fact, exempted from coverage, i.e. the pastors and all male teachers. This exemption, presumably, is without major impact on the state's legitimate concerns for its unemployment compensation insurance program.

As has been referred to previously, sectarian education historically has been recognized as a legitimate church ministry. History and tradition may be important factors in any balancing of state and ecclesiastical interest. *Wisconsin* v. *Yoder,* 406 U.S. 205, 209-13, 225-27 (1972).

In *NLRB* v. *Catholic Bishop of Chicago, supra,* this Court indicated that an administrative agency

may not engage in activities which tend to jeopardize the religious freedoms of an organization unless the agency's conduct is authorized by a clear expression of an affirmative congressional intent. The fact there is no such clear expression is one additional weight that may be placed upon the scale which balances the interests of the state against the First Amendment protection for ecclesiastical concerns.

If parents are morally and constitutionally free to choose the environment of their child's educational process, and the public schools are to be insulated at least to a large extent from sectarian pressures, there should be the widest latitude possible granted to the parochial school and its operation and control. The greatest amount of independence consistent with the Least Intrusive Alternative/Compelling State Interest Test should be reserved for church-operated schools. Freedom of religion may be restricted only to prevent grave and immediate danger to interests which the state may lawfully protect. *Board of Education* v. *Barnette,* 319 U.S. 624, 639 (1943). The courts have long recognized the validity of application of health and safety regulations to parochial schools. However, further impact by the state on institutions that are basically ecclesiastical in nature should be permitted after passing only the closest of judicial scrutiny. This Court in *NLRB* v. *Catholic Bishop of Chicago, supra,* referring to Mr. Justice Douglas' comment in *Lemon,* noted "the admitted and obvious fact that the *raison d'être* of parochial schools is the propagation of a religious faith."

The sensitive treatment which this Court has always given when considering even only the potential of state surveillance and intrusion into church-operated ele-

mentary schools should be an additional factor in the balancing process.

An even-handed approach to the First Amendment would seem to suggest that the religion clauses, serving as they do as a buckler to prevent financial aid to sectarian schools, should not be any less effective to ward off the inhibiting effect of governmental controls and demands. *Catholic Bishop* v. *NLRB,* 559 F.2d 1112, 1131 (7th Cir. 1977).

The required unemployment insurance coverage of church-operated schools can have a devastating financial impact on the church and its ability to provide sectarian education. While some schools are probably capable of surviving the new tax, it is conceivable that other schools may be forced out of operation. Comment, *Bringing Christian Schools Within the Scope of the Unemployment Compensation Laws: Statutory and Free Exercises Issues,* 25 Vill. L. Rev. 69, 110-114 (1979-80).

The religion clauses envisoned broad objectives premised upon a general colonial fear of sovereign intrusion into religious areas. This Court expressed this concern for the zealous protection of religious liberty when it suggested that the First Amendment "radiates . . . a spirit of freedom for religious organizations, and independent from secular control or manipulation." *Kederoff* v. *St. Nicholas Cathedral,* 344 U.S. 94, 116 (1952).

No governmental agency should, except upon an adequate showing of a compelling state interest and the absence of any less intrusive and entangling alternative, ever involve itself in the educational ministry of

the church when state interests conflict with the free exercise rights of the church-operated school.

As James Madison said, "It is proper to take alarm at the first experiment on our liberties." Recently this Court, in *Lemon* v. *Kurtzman, supra* at 624-25, reiterated the vital importance of arresting even the slightest breach of the First Amendment's guarantees:

> [M]odern governmental programs have self-perpetuating and self-expanding propensities . . . . [W]e cannot fail to see that in constitutional adjudication some steps which when taken were thought to approach 'the verge' have become the platform for yet further steps. A certain momentum develops in constitutional theory, and it can be a 'downhill thrust' easily set in motion but difficult to retard or stop. . . . The dangers are increased by difficulty of perceiving in advance exactly where the 'verge' of the precipice lies. . . . [I]nvolvement or entanglement between government and religion serves as a warning signal.

CONCLUSION

For the reasons set forth herein, the judgment of the Supreme Court of the State of South Dakota results in a violation of the religion clauses of the First Amendment to the United States Constitution and therefore must be reversed.

Respectfully submitted,

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No. 80-120

IN THE

Supreme Court of the United States

October Term, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH, and NORTHWESTERN LUTHERAN ACADEMY,
Petitioners,

v.

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Respondent.

On Writ of Certiorari to the Supreme Court of the State of South Dakota

MOTION OF ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, ET AL., TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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MOTION OF ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, ET AL., TO FILE BRIEF AMICUS CURIAE

Association of Christian Schools International; Grace Brethren Church and David L. Hocking, its pastor; Calvary Cross Church of the Highlands and Reverend Donald B. Sheeley, its pastor; Scott Memorial Baptist Church and Reverend Tim LaHaye, its pastor; Christian Unified Schools of San Diego; Redwood Christian Schools; Sidney Bowen and Patricia Bowen, his wife; Peter Farrelly and Sue Farrelly, his wife; William Tschantz and Janet Tschantz, his wife; Arthur Brandwood and Cheryl Brandwood, his wife; Stanley Edington; R. Florence Murti; and R. Suzanne Royer hereby respectfully move for leave to file the attached brief *amicus curiae* in this case. The con-

sent of the attorney for the petitioners has been obtained. The consent of the attorney for the respondent was requested but was refused.

The interest of Association of Christian Schools International and its associated *amici* arises from the fact that the *amici* pastors, parents and staff members are parties to a case (now tried and awaiting disposition) presently pending in the United States District Court for the Central District of California in which the same issues are before the court, namely, whether the imposition of the federal-state unemployment tax program upon church-schools is authorized by an act of Congress and, if so, whether that imposition violates the Religion Clauses of the First Amendment. *Grace Brethren Church, et al. v. State of California Employment Development Department, et al.*, Civil Case No. 79-93-MRP.

In the instant case, it is believed that the issue of excessive entanglements forbidden by the Establishment Clause were insufficiently developed before the South Dakota Supreme Court and that the brief which *amici curiae* are requesting permission to file will contain a more extensive argument on that constitutional issue. If this argument is accepted, it would be dispositive of the case.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

BRIEF AMICUS CURIAE OF ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL, ET AL.

INTEREST OF THE AMICI CURIAE

The Association of Christian Schools International (ACSI) represents the interests of over 1400 Christian elementary and secondary schools in the United States. There are more than 235,000 students enrolled in these schools, and membership in ACSI schools is increasing daily.

Grace Brethren Church and David L. Hocking, its pastor; Calvary Church of the Highlands and Reverend Donald Sheely, its pastor; Scott Memorial Baptist Church and Reverend Tim LaHaye, its pastor; Christian Unified Schools of San Diego; Redwood Christian Schools; Sidney Bowen and Patricia Bowen, his wife; Peter Farrelly and Sue Farrelly, his wife; William Tschantz and Janet Tschantz, his wife; Arthur Brandwood and Cheryl Brandwood, his wife; Stanley Edington; R. Florence Murti; and R. Suzanne Royer are churches, schools, pastors, parents and teachers who brought suit for injunctive and declaratory relief in the United States District Court for the Central District of California (Civil Case No. 79-93-MRP) against the State of California and the United States Department of Labor in January of 1979 in order to restrain imposition of the federal-state unemployment compensation program upon them. After full consideration of the evidence, briefs and oral arguments in that case, the court, on September 21, 1979, entered a preliminary injunction in favor of the plaintiffs. Trial on the permanent injunction was held August 12-14, 1980.

The *amici curiae* conduct pervasively religious schools which would not exist except for their religious mission. This activity is now imperiled by the threatened imposition of the unemployment insurance program by the Secretary of Labor.

SUMMARY OF ARGUMENT

The Secretary of Labor has overstepped both statutory and constitutional limitations in decreeing that church-schools so lack sufficient religious purpose and character as to be free from enforced participation in a governmental social program. In doing so, he has already violated constitutionally protected liberties of churches, schools, pastors, parents and teachers, and his directives guarantee, unless judicially interdicted, that those liberties will be violated to an even greater extent in the future.

The Secretary's actions, if found to be licit, portend a nearly limitless subordination of religious institutions to the will of the government.

ARGUMENT

I. The Congress Did Not Extend Unemployment Insurance Coverage to Religious Ministries of Churches

This is a case of first impression in this Court. It poses directly the questions, whether the federal government may define the religious mission of a church, whether it may regulate religion, whether it may enter into entangling relationships with religious schools, and whether it may tax religious expression. The unconstitutional answers given by the Secretary to these questions are coupled with a primary constitutional error—namely, that the Secretary, as a public servant, may act outside of congressional authorization.

A. Nature and Mission of the Religious Schools

The religious schools represented by *amici* were not built by government and are not—even indirectly—maintained by government. They have been created as a trust by Christian people who have dedicated their savings and the gift of religious vocations to that trust. The criteria for employment of teachers in these schools are, first of all, religious. Unlike public or nonsectarian schools, these schools exist for a religious mission *to which everything in the life and operation of the school is subordinate.* These religious entities are considered by their sponsors to be communities of faith, in which all employees work commonly for the religious ends for which the schools are established.

This Court has repeatedly defined such schools, not as secular offshoots of a church, but, in fact (where the school is church-operated) as *the church itself.* The characteristics of these religious schools most frequently relied upon by this Court and other courts in discussing the religious

nature of these entities all apply to the schools represented by *amici*. They:

(a) are all "religious enterprises" (*Lemon v. Kurtzman*, 403 U. S. 602, 618 (1971)), and are conducted as "an integral part of the religious mission" of churches. *Id.; Meek v. Pittenger*, 421 U. S. 349, 366 (1975);

(b) are institutions whose substantial and dominant purpose is the inculcation of religious values. *Tilton v. Richardson*, 403 U. S. 672, 685 (1971);

(c) are institutions in which religion is so pervasive that a substantial portion of their functions is subsumed in the religious mission which is the only reason for the schools' existence. *Meek, supra*, at 366;

(d) are institutions whose affirmative and dominant policy of instruction for children is to assure future adherents to the Christian faith by having control of their education at an early age. *Tilton, supra*, at 685-686;

(e) carry on activities, a substantial portion of which are religiously oriented. *Lemon, supra*, at 618;

(f) conduct and sponsor religiously oriented extra-curricular activities. *Lemon, supra*, at 615;

(g) are housed in buildings, whose exteriors contain identifying religious symbols, and whose interiors, such as classrooms and hallways, contain Christian religious symbols, as well as inspirational quotations from scripture and other religious doctrinal sources. *Lemon, supra*, at 615;

(h) are institutions which have an atmosphere in which religious instruction and religious vocations play a part in the educational function. *Lemon, supra*, at 615;

(i) are institutions which are vehicles for transmitting the Christian faith to the next generation. *Lemon, supra,* at 616;

(j) are institutions which involve substantial religious activity and purpose. *Lemon, supra,* at 616;

(k) employ teachers who are subject to the direction and discipline of religious authority which necessarily pervades the school. *Lemon, supra,* at 617-618; *Meek, supra,* at 371;

(l) employ teachers who work in schools which are operated to inculcate the tenets of the Christian religion and which are dedicated to rearing children in that faith. *Lemon, supra,* at 618; *Meek, id.*;

(m) employ teachers, all of whom are (and must be) Bible-believing-and-practicing Christians. *Lemon, supra,* 618; *Tilton, supra,* at 687-688;

(n) are operated in accordance with the convictions of their memberships, whose source is solely their religion as required by the Bible, for the ultimate purpose of instructing children in the philosophy and mandates of the Scriptures, in such manner as to lay a biblically motivated educational foundation for the free choice of spiritual salvation and discipleship. *State of Ohio v. Whisner,* 47 Ohio St. 2nd 181 (1976);

(o) do not divide instruction into "religious" and "secular" compartments, the entire ongoing life of the church-school community being religious. *Catholic Bishop of Chicago v. NLRB,* 559 F. 2d 1112 (7th Cir. 1977); *Caulfield v. Hirsch,* 95 L. R. R. M. 3164 (E. D. Pa. No. 75-279 Civ., 1977); *McCormick v. Hirsch,* 460 F. Supp. 1337 (M. D. Pa. 1978). As the Supreme Court said of the church-schools considered in *Meek, supra,* in those institutions there is no discrete "secu-

lar" education which can be separated off from their pervasive religious mission: *"Within the institution the two are inextricably intertwined."* *Id.* at 366, (Emphasis supplied.)

There can be no doubt that the persons who assist in the carrying out of these religious ministries are in the employ of a "church", or of "an organization which is operated primarily for religious purposes." 26 U. S. C. § 3309(b)(1). *Alabama v. Marshall,* 636 F. 2d 366 (5th Cir. 1980).

B. The Secretary of Labor's Application of the Statute Is Ultra Vires

Faced with the plain language of 26 U. S. C. § 3309 (b)(1), the aforesaid determinations by this Court, and this Court's most recent admonition that religious entities will not be deemed subject to inhibiting Congressional enactments in the absence of "the affirmative intention of the Congress clearly expressed," *NLRB v. Catholic Bishop,* 440 U. S. 490, 501 (1979), the U. S. Department of Labor nevertheless takes the following position:

> "The only services performed in church-related elementary and secondary schools *recognized* as being within the scope of the exclusion permitted by section 3309(b)(1), FUTA (Federal Unemployment Tax Act) . . . are *those strictly church duties* performed by church employees at the schools *pursuant to their church responsibilities.*" (Directive to State Employment Security Agencies by Lawrence W. Rogers, Administrator of Field Operations, Employment and Training Administration, U. S. Department of Labor, May 30, 1978.) (Emphasis supplied.)

This can only be called *homemade law,* an administrator's invention, the attempt by a public servant to legislate

for the entire nation based upon his personal proclivities or those of a handful of other public servants in the Department of Labor. It is at least psychologically significant that the statement does not say "The only services . . . *which are* within the scope of the exclusion," but rather "The only services *recognized* (*i.e.*, by us individual public servants) as being within the scope of the exclusion. . . ." The Department then invents the concept (nowhere discoverable in the Act) of "strictly church duties", and proceeds to tell the churches what it deems "strictly" to include and what it deems "strictly" to exclude.

II. The Secretary's Interpretation of the 1976 Amendment to FUTA Results in Violation of the Religion Clauses of the First Amendment

In two ways, the interpretation given by the Secretary of Labor to the 1976 amendment to the Federal Unemployment Tax Act results in violation of the Religion Clauses of the First Amendment. The first way consists *in se* of the Secretary's act in preempting of the church's role of defining "church" activity. The second consists of the act of imposing the government unemployment compensation program on the religious ministries which are involved here. Both are violative of the Establishment Clause of the First Amendment and both create injury to interests of church-schools protected by the Free Exercise Clause thereof.

A. Governmental Determination of What Is "Strictly Religious"

In *Kedroff v. St. Nicholas Cathedral,* 344 U. S. 94 (1952), the Court noted the century-old recognition of

> ". . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, a power to decide for themselves,

free from state interferences, matters of . . . *faith and doctrine.*" *Id.* at 116. (Emphasis supplied.)

Obviously, the power to define "church" or "religion" is the power to limit religion and its expression. But this Court has already expressly denied that power of restriction-by-definition to government in instances where a government agency had sought to claim it. *United States v. Ballard,* 322 U. S. 78, 86 (1943); *Clay v. United States,* 403 U. S. 698 (1971).

The Secretary of Labor, as noted, has variously held that schools operated by churches are not operated "*primarily* for religious purposes"; also that, though the purposes are religious, they are not, in his view, "strictly" religious. Thus government arrogates to itself the power to define religious ministries. In so doing, it presumes to say what is, and what is not, "*religious*" teaching. This personal posture adopted by individuals in the Department of Labor flies in the face of teachings of this Court and is violative of both the Establishment and Free Exercise Clauses of the First Amendment.

B. Imposition of the Program

1. Application of the Federal Unemployment Tax Act Denies Churches the Free Exercise of Religion

This Court, in *Sherbert v. Verner,* 374 U. S. 398 (1963), provided the test that government regulation which burdens the free exercise of religion must meet: such imposition must be justified by "a compelling state interest in the regulation of a subject within the State's constitutional power to regulate." The Court illuminated the concept of "compelling state interest" as follows:

"It is basic that no showing merely of a rational relationship to some colorable state interest would

> suffice; in this highly sensitive constitutional area, '(o)nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation'." *Id.* at 406

The church-schools represented by *amici* are operated as integral parts of the religious mission of the churches with which they are affiliated. These schools have been founded for one purpose alone: to aid the churches in their teaching ministry—a ministry central to the churches' existence—by transmitting the Word of God to the children of Christian believers. The churches, schools, pastors, parents and teachers are all engaged in religious activity and the accomplishment of religious missions through the maintaining of their schools, through teaching in them, and through having one's child educated in them. The policy of the Secretary of Labor in imposing government unemployment compensation coverage burdens this religious activity.

The church-schools represented by *amici* are non-tax-supported. They have not a nickel to spare. Their sources of funding are only as deep as the pockets of their congregation members. Most of these are individuals of modest means. The schools' very limited funding precludes its being siphoned off into programs not germane to their mission and neither needed nor wanted by their employees.

Moreover, these church funds are held as a trust for religious purposes. Concern for religious autonomy in the determination of the proper expenditure of these funds demands that government not requisition such funds for its own secular purposes. Mr. Justice Brennan, in his concurring opinion in *Walz v. Tax Commission*, 397 U. S. 664 (1970), indicated that "taxation would surely influence the allocation of church resources" and would result in "diverting funds otherwise available for religious . . . pur-

poses to the support of the government," and may, for that reason alone, be a violation of the Free Exercise Clause. 397 U. S. at 692. *Amici* concur in this statement. It is no answer to say that the tax may be small in amount. It is a direct tax [1] upon free religious expression and, as such, cannot be imposed without some compelling state interest. *Murdock v. Pennsylvania,* 319 U. S. 105 (1943).

2. Installation of Government as Arbiter Over What Is or Is Not Religious Within Church-Schools Burdens the Free Exercise of Religion by Churches and Their Schools, and Excessively Entangles Government With Religion

The policy of the Secretary of Labor mandates that the unemployment compensation program cover all services performed in church-related elementary and secondary schools which are not "*strictly church duties* performed by church employees at the school pursuant to their church responsibilities."

This policy requires that government officials in charge of the program make determinations of

—what are "church duties"

—which of these are "strictly" church duties

—what are the employees' "church responsibilities"

—which of their "strictly church duties" are performed at the school "pursuant to their church responsibilities".

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1. *Cf. Braunfeld v. Brown,* 366 U. S. 599 (1961) (misapplied by the Court below), where a merely indirect financial burden on Sabbath observance was found constitutionally permissible by a plurality of the Court.

It is thus incumbent upon a state not merely to make religious judgments, but indeed to conduct whatever investigations and evaluations may be required as the basis for making such judgments.

Such investigations have therefore proceeded in states which complied with the Secretary's directive. A striking example of this is seen in the *Grace Brethren Church* case, *supra*, in the investigation, by unemployment compensation officials, of Pastor Reuben Sequeira.[2] Pastor Sequeira was visited by a State auditor on April 5, 1979, who demanded to see all printed materials utilized in the Pastor's school and to examine the school's curriculum. The visiting State official, over the protest of Pastor Sequeira, stated that the church and its school must be regarded as separate entities. The same official, in examining the curriculum, textbooks, music, aquarium and all other facilities of the school, made two headings: "secular" and "religious", and assigned all items to one heading or the other.[3]

It may be argued that this exercise of State power was simply aberrant conduct on the part of a particular State agent, but plainly it was not. It was, instead, the practical and logical carrying out of the aforementioned mandates.

3. Enforcement of the Unemployment Compensation Program Would Violate the Establishment Clause by Excessively Entangling Government With Religion

This Court has frequently spoken a condemnation of "excessive entanglements" between church and state. Two features of that condemnation are to be especially noted.

2. See Affidavit of Pastor Sequeira hereto attached as Appendix A.

3. Audits of this type have already received the disapprobation of this Court. *New York v. Cathedral Academy*, 434 U. S. 125, 132 (1977).

First, such entanglements not only enmesh government in church endeavors but also impair the free exercise of religion through "government direction of churches". *Lemon v. Kurtzman,* 403 U. S. 602, 620 (1971). *Second,* the "entanglement" cases are almost entirely concerned, not with actual entanglement, but with the *potential* for entanglement. *Lemon* tested the Pennsylvania statute there involved on a motion to dismiss, and there was no record evidence of entanglement. The Court, however, condemned the Pennsylvania statute on the basis of the "hazards" and "dangers" (*ibid.*) which it posed, a relationship "pregnant" with involvement. Therefore, the entanglement which will likely flow from a statute condemns that statute.

In *Walz v. Tax Commission,* 397 U. S. 664 (1970), the Court warned against governmental involvements with churches which produce "a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize." The Court expressed particular concern over the introduction of any "element of governmental evaluation and standards," and warned, on Establishment Clause grounds, against policies which can lead to "confrontations and conflicts" between government and churches. *Id.* at 674.

In *Lemon, supra,* the Court described as a "classic warning" Mr. Justice Harlan's separate opinion in *Walz* wherein he spoke of "programs, whose very nature is apt to entangle the state in details of administration." *Id.* at 615. The Court also warned against "sustained and detailed administrative relationships (between government and these schools) for enforcement of statutory or administrative standards." *Id.* at 621.

The Court also noted that, with respect to the grants to colleges upheld in *Tilton v. Richardson,* 403 U. S. 672 (1971), there were no entanglements:

> "There are no continuing financial relationships or dependencies, no annual audits, and *no government analysis* of an institution's expenditures *on secular as distinguished from religious activities.*" *Id.* at 688. (Emphasis supplied.) [4]

The Supreme Court, in *Walz*, has indicated that the processes of taxation of church activity (*i.e.*, tax valuation, tax liens, tax foreclosures, "and the direct confrontations and conflicts that follow in the train of those legal processes", *Walz, supra,* at 674) constitute, without more, entanglements between government and religion.

At the outset of this administrative relationship, the State must audit the financial records of the church in order to determine how much of the church's funds has been applied to "secular" functions of teachers and how much has been applied to their "religious" functions.

The church is then required, on a regular basis, to make reports to the State concerning liability for contributions, and is also required to keep its books open for inspection by State auditors. The church will also have to post government notices on their premises regarding unemployment compensation, thus being made the instrument of the State in disseminating information to persons who are performing religious functions. This information may also be such as to encourage fractionalization of the school faith community.[5]

Many other administrative commands must be obeyed, and limitless inspections and evaluations of reli-

---

4. Similar inspection was enjoined in *Surinach v. Pesquera des Busquets,* 604 F. 2d 73 (1st Cir. 1979), on the basis of its entangling nature.

5. See Affidavit of Eloise Brown, filed in the *Grace Brethren Church* case, and attached hereto as Appendix B.

gious matters permitted, most under criminal penalty for non-compliance.[6]

This type of entanglement, when coupled with the inhibitive element of coerced State extraction of funds intended for religious use, is "excessive entanglement" and impermissible by virtue of the Establishment Clause of the First Amendment.

4. Requiring Government to Rule Upon Whether a Teacher Was Discharged for "Misconduct", or Left for "Good Cause," Burdens the Free Exercise of Religion by Churches and Religious Schools, and Excessively Entangles Government With Religion.

In safeguarding the integrity of the religious mission with which he is entrusted, a pastor must exercise the responsibility of discharging teachers, and others, for religious or moral behavior which might, or might not, meet the secular standards of "misconduct" under his state's unemployment insurance law. But submitting a pastor's religious or moral decision to discharge an employee to government evaluation involves two distinct unconstitutional aspects: the free religious choice of the pastor is burdened by the deterrent effect of the risk of incurring state taxation as a result of the discharge; and government sets itself up as judge of whether the discharge was actually for religious or moral misconduct. This latter aspect itself suffers from two distinct defects: (a) government is put into the forbidden position of applying a religious standard to employee conduct;[7] and (b)

6. See, for example, California Unemployment Insurance Code §§ 1085, 1086, 1088, 1089, 1092, 1126, 1128, 1703, 1735, 1815, 1953, 2105, 2108, 2109.

7. This forbidden inquiry is common, as well, to determinations of whether an employee left for reasons of "just cause" where doctrinal or moral disputes are implicated.

government is made to probe into religious determinations in order to ascertain the extent of religious motivation therefor. Both of these defects represent impermissible entanglements between government and religious activity.

As the Court stated in *Catholic Bishop of Chicago,* when speaking of government inquiry into teacher dismissals:

> "It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but the *very process of inquiry* leading to findings and conclusions." 440 U. S. at 502 (Emphasis supplied).

This entangling and chilling process results from involvement of government in a "church-teacher relationship in a church-operated school [which] differs from the employment relationship in a public or other non-religious school." *Id.* at 504.

Teachers play a "key role", *Catholic Bishop, supra* at 501, in the religious mission of the church-school. That mission embraces at least the following areas:

—curriculum

—pervasiveness of Bible-centered religion in the life of the school

—discipline

—dress

—moral conduct of faculty and students

—religious character and religious witnesses of the teachers

—religious atmosphere

—the faculty as a community of faith

—control of teaching and school life from point of view of faith and morals

—religious holidays and time and character of religious observances.

With respect to each of these sensitive areas, it is possible that cause may arise which will warrant dismissal, on religious grounds, of an employee in a religious school. In that event, following a claim for unemployment compensation, the secular authority (in the form of the hearing examiner) would be called upon to rule upon whether the dismissal was for just cause, or upon whether the conduct of the employee constituted gross misconduct. The hearing examiner would either (a) enter into the merits of the religious cause for dismissal (as, for example, by determining whether any use of alcohol by a teacher is, in fact, Biblically forbidden), or (b) ignore the religious objection (and merely inquire whether the teacher was sober, punctual and efficient in his or her work). Under (a) the hearing examiner would plainly be in violation of Establishment Clause limitations in that, as seen, the state may not make religious judgments. Under (b) the hearing examiner would be in violation of the Free Exercise Clause in that he would be suppressing a basic religious freedom—the right of a religious institution to dismiss an employee where that employee violated the faith or moral requirements of the institution.[8] Conclusive evidence of all of this is seen in the testimony of the

8. Although the church-schools of *amici* maintain a conscientious opposition to the practice of abortion and extra-marital sex, the Federal Unemployment Tax Act forbids a state to deny an award of benefits "on the basis of pregnancy or termination of pregnancy". 26 U. S. C. § 3304(a)(12). Thus a church employee dismissed for pregnancy out of wedlock or for procuring an abortion would be paid benefits at the expense of the church.

Government officials called as expert witnesses by the Secretary of Labor at the trial in *Grace Brethren, supra,* August 13, 1980. This evidence may be summarized as follows:

a. A secular agency (the hearing examiner or like state functionary) entertains and passes upon conflicting claims as to whether the employee of a religious body was discharged because of violation of that body's articles of faith. (T2, 177-180).[9] That is to say, the state has jurisdiction to determine religious questions. (*Ibid.*; T2, 200).

b. The religious body which is the employer is made to bear the burden of proof that (a) the particular doctrine was part of an agreement between itself and the discharged employee and (b) that the employee breached that agreement. (T2, 180).

c. Where the religious body discharges the employee due to its judgment that the employee had shown a decline in religious fervor, the state agent must declare this not to be misconduct unless it has caused harm to the religious body, and the *state* is the judge of whether "harm" has in fact taken place. (T2, 183-184).

d. The agent of the state must become familiar with religious doctrine (T2, 197) in order to be able to determine not merely whether there has occurred a violation of an express rule of the religious body, but even to determine the religiously subtler issue of whether there has occurred a violation of an implied rule of that body. (*Ibid.*).

e. Within the state's jurisdiction to determine religious reasons for discharge is also jurisdiction to weigh and determine moral reasons for discharge. (T2, 200).

f. Whether or not an employee of a religious body, who was discharged on account of incompetence, was in-

9. The references are to the trial transcript.

competent to communicate the doctrine of the religious body is a matter to be determined by the state (T2, 202-203), and if this incompetence were not willful, it would not be construed as misconduct. (T2, 203).

g. The state determines whether the religious body need have given express warning to its employee, and whether that warning was reasonable or needed. (T2, 207-209).

h. The state determines whether a particular rule of the religious body is an important one. (T2, 210-211).

i. The state makes "a determination of the effect [of the employee's conduct] on the religion or the church". (T2, 212).

j. The state may determine whether a religious body is a church (T2, 249), and whether a particular employee of that body is a minister. (T2, 265).

k. Where a religious body and its discharged employee dispute the reasonableness of the rule of the religious body which that body claims the employee violated, the state will determine the issue of reasonableness. (T2, 250-252).

l. In the case wherein there appears to have been a misunderstanding over whether a doctrinal point had been agreed upon by the religious body and its employee, the state must find in favor of the employee. (T2, 255).

m. Where the religious body and its employee disagree upon a point of doctrine, "that situation would lend itself to a decision in favor of the employee". (T2, 259).

A worse catalog of Establishment Clause violations would be difficult to imagine. Here is not merely unlawful entanglement; the inevitable effect of the application

of the Act to religious schools is a forbidden envelopment of the interests of the latter by government. Church-state separation is utterly breached by such processes as that application calls for.

The post-discharge processes are, of course, a necessary working part of the unemployment compensation program. If there is no allowance to the employer for misconduct situations, then every discharge is compensable. If such allowance is made, then the state *is* obligated to determine the existence, or not, of misconduct. But in the application of the Act to religious organisms, the term "misconduct" is necessarily weighted with a range of religious and moral matters, and if anything is clear under the Constitution, it is that government may have *"no role"* in passing upon such matters.

Also, however, is the potential effect upon *present* employees of the exercise by government of that forbidden role. In *Catholic Bishop of Chicago, supra,* this Court pointed to the effect of the very presence of NLRB jurisdiction over the religious schools there considered:

> " 'The real difficulty is found in the chilling aspect that the requirement of bargaining will impose on the exercise of the bishops' control of the religious mission of the schools.' " *Id.* at 496.

C. Lack of Compelling State Interest.

Where (as here) substantial, non-frivolous Free Exercise claims are made against a particular governmental action, it is no answer to say that that action has been undertaken in the public interest. The achieving of worthwhile, or even needful, public objectives does not justify the restricting of religious liberty. Under *Sherbert* and *Wisconsin v. Yoder,* 406 U. S. 205 (1972), the hurdle which government must cross, if it is to restrict religious liberty, is far higher.

Plainly, no compelling state interest is involved in forcing the challenged unemployment compensation and disability insurance programs on church-schools. An extremely strong and clear declaration by the Congress, that some interest of critical national significance exists—"paramount",[10] in the words of this Court—would need to be shown to establish that Congress believed that the application of the program to religious educational ministries was of supreme necessity. But no such declaration exists. Not even a hint of a "compelling" interest appears in the debates. The 1976 amendments extending FUTA were deemed merely socially useful or desirable. The amendments to FUTA were extremely extensive, and the inclusion of elementary and secondary schools was but one feature of them. The debates indicated that an important reason for extending coverage to new groups (among these the large group of employees of state and local governments) was "to keep the system from going broke." While the inclusion of employees of religious schools can have no real effect on keeping the system solvent, even if it did, the jacking up of a failing social program by enforced contributions from religious congregations would in no sense warrant infringement upon religious liberty.

10. In *Yoder*, religious liberty interests were held to outweigh even those governmental interests "at the very apex of the function of a State." 406 U. S. at 213.

CONCLUSION

For all the foregoing reasons, *amici* respectfully urge the Court to reverse the decision of the court below.

Respectfully submitted,

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FILED MAY 18, 1979

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GRACE BRETHREN CHURCH OF LONG BEACH and REVEREND DAVID L. HOCKING, its Pastor, et al.,
Plaintiffs,

v.

STATE OF CALIFORNIA, Acting through the EMPLOYMENT DEVELOPMENT DEPARTMENT: The Honorable MARTIN R. GLICK, Director of Employment Development, et al.,
Defendants

THE STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT,

Cross-Claimant,

v.

RAYMOND MARSHALL, as Secretary of Labor of the United States,

Cross-Defendant.

No. 79 0093 MRP (Kx)

Declaration of Dr. Reuben Sequeira

Date: May 23, 1979

Time: 9:30 A. M.

Place: JUDGE PFAELZER'S COURTROOM

I know personally of the matters herein contained and if called upon to testify under oath would and could testify as follows:

1. I reside at 1675 Grand Avenue, San Rafael, California. I am a taxpayer and a citizen of the United States and of California.

2. I am presently, and have been for the last ten years, the pastor of Trinity Community Church, located in San Rafael, California. As pastor, I oversee the running of the church, including all of its ministries.

3. Trinity Community Church has, as one of its ministries, a preschool known as Daystar Christian Preschool. The preschool is an integral part of the vision and extended teaching ministry of Trinity Community Church in its God-given mandate to train children.

4. In January of 1979, the Church received correspondence from the California Employment Development Department, including a form letter dated January 26, 1979, informing us that we were subject to the unemployment insurance. A copy of the correspondence is attached hereto as Exhibit A, and by this reference incorporated herein.

5. On February 1, 1979 I sent a reply letter to the Department, a copy of which is attached hereto as Exhibit B, and by this reference incorporated herein.

6. Sometime in March of 1979, I received a call from Mr. Ted E. Atz, Jr., auditor of the State of California. He requested an interview with me concerning Daystar Christian Preschool.

7. On April 5, 1979 at 4:00 P.M., Mr. Atz came to our Church. He asked to see any printed material that I could give to him. I gave him a copy of our current brochure for Daystar Christian Preschool, a copy of which is attached hereto as Exhibit C, and by this reference incorporated herein.

8. Mr. Atz then read to me from some guidelines that he had brought, as to the reasons why the school is now subject to the unemployment insurance, and explained that although the State had not taxed the school before, they were to begin to do so now. The position of the State, he said, was that since the Church and the school were separate, the school was taxable. At this, we had him note the sponsorship statement in the brochure. We explained to him the ministry of the school and noted that the Church Council rather than the School Council is the ultimate governing body of the school, as this ministry is no different than any other ministry of the Church.

9. The fact that the school was controlled by the Church apparently made little difference to Mr. Atz. His response was that the guidelines were to distinguish between the secular and the religious school. He began to look over our curriculum. He made two column headings on a paper, one of them being secular, the other religious. In looking over the brochure, he saw the worship center and put that under religious instruction without qualification. When it came down to music, he questioned whether it should be religious or secular. I told him that music was ordained of God, God has given us music, he is a God of harmony, His creation sings, and music was to glorify God. He asked me if we sang anything else besides religious songs. I told him that all the songs that we sing are glorifying to God. He put music under the religious heading.

10. Mr. Atz also asked about the nature center. I replied, "Well, we have an aquarium with fish in it. The children learn about how to feed the fish, what the fish are like, what the fish do, study their movement, etc. However, when we come to the fact of how fish came into being, we talk about a loving Creator who made them." He decided to put that under both religious and secular headings.

11. In art, Mr. Atz wanted to know what we drew and what we did in the art center. Again, we explained to him that God is a God of order, symmetry and color. One cannot have true art without having its origin in God. I then described a particular project where the children made cocoons with caterpillars in them. A few days later they made butterflies. This transformation was to symbolize the resurrection of Jesus Christ and our resurrection. The caterpillar had been transformed by the power of God. Thus, the teaching of the resurrection became im-

planted in the young lives. God even teaches the resurrection in His Creation. After giving him this explanation, I asked Mr. Atz whether this was religious or secular. He ended up putting it in both columns.

12. Mr. Atz's next inquiry concerned the block center. He was going to put it under the secular column, until I explained to him that while the block center is a very vital part of teaching manipulative games, balance, symmetry, coordination, etc., it was designed not only for physical and mental growth, but to teach Christian values in social concerns. As God has made us to dwell in communities and not in isolation, we view it as important to teach Christian values in relating from a Biblical viewpoint. He then put the block center under both columns.

13. Another question that Mr. Atz asked was whether the school was licensed by the State. I told him that it was. He seemed to imply that since it was, it was an admission that the State had authority over the school. I let him know that the licensing of the School was in no way our admission that the State had control or authority over the school. Rather, it was a procedure to demonstrate our willingness to cooperate with the State. Indeed, our school exceeds the State requirements. I also told him that if licensing the school meant an admission that the State had authority over the Church, then we would not receive any further licensing from the State.

14. Before Mr. Atz left, I asked him what his recommendation would be from this investigation. He stated that he could not give it at the time, but that we would be hearing from him. He said that his biggest problem would be having to convince his superior, but that if it was unfavorable to us, we could appeal it. He has not, at the time of the signing of this Declaration, let us know what his decision is.

Executed at Los Angeles, California, this 16th day of May, 1979.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Dr. REUBEN SEQUEIRA
By: Lisa A. Runquist

APPENDIX B

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FILED MAY 18, 1979

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CENTRAL DISTRICT OF CALIFORNIA

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Plaintiffs,

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STATE OF CALIFORNIA, Acting through the EMPLOYMENT DEVELOPMENT DEPARTMENT: The Honorable MARTIN R. GLICK, Director of Employment development, et al.,
Defendants.

THE STATE OF CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT,

Cross-Claimant,

v.

RAYMOND MARSHALL, as Secretary of Labor of the United States,

Cross-Defendant.

No. 79 0093 MRP (Kx)

Declaration of Eloise Brown

Date: May 23, 1979

Time: 9:30 A. M.

Place: JUDGE PFAELZER'S COURTROOM

I know personally of the matters herein contained and if called upon to testify under oath would and could testify as follows:

1. I reside at 1046 W. 79th Street, Los Angeles, California. I am a taxpayer and a citizen of the United States and of California.

2. I am presently, and have been since July, 1978, Administrator of Normandie Christian School of Los Angeles.

3. Sometime after I began working for Normandie Christian School we received a poster from the Department of Benefit Payments, a copy of which is attached hereto as Exhibit A and by this reference incorporated herein.

Executed at Los Angeles, California this 16 day of May, 1979.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ ELOISE BROWN

Exhibit A

NOTICE TO EMPLOYEES

THIS EMPLOYER IS REGISTERED UNDER THE CALIFORNIA UNEMPLOYMENT INSURANCE CODE, AND WAGE CREDITS ARE BEING ACCUMULATED BY YOU FOR

UNEMPLOYMENT INSURANCE

(Paid for entirely by EMPLOYERS' taxes)

and

DISABILITY INSURANCE

(Paid for entirely by WAGE EARNERS' taxes)

- WHEN YOU ARE UNEMPLOYED AND READY, WILLING AND ABLE TO WORK, YOU MAY BE ELIGIBLE TO RECEIVE UNEMPLOYMENT INSURANCE

  You must file a claim for Unemployment Insurance at the nearest Employment Development Department Office, and register for work.

- IF YOU WORK LESS THAN YOUR NORMAL FULL-TIME HOURS AND EARN LESS THAN YOUR WEEKLY BENEFIT AMOUNT BECAUSE YOUR EMPLOYER DOES NOT HAVE WORK FOR YOU, YOU MAY ALSO RECEIVE BENEFITS

  You must file a claim for Unemployment Insurance at the nearest Employment Development Department Office.

- WHEN YOU ARE UNABLE TO WORK BECAUSE OF SICKNESS OR INJURY, YOU MAY BE ELIGIBLE TO RECEIVE DISABILITY INSURANCE AND/OR HOSPITAL BENEFITS

  1. If this firm operates under an approved Vountary Plan of Disability Insurance and you have chosen to be covered by it, claim forms should be obtained from your employer.
  2. For State Disability Insurance, claim forms may be obtained from your doctor, hospital, or any Employment Development Department Office. The First Claim must be mailed not later than the 20th day after the first day for which benefits are payable if you are to receive credit from the time you first became disabled. Earlier filing will speed your payment.

- GET FULL INFORMATION AT YOUR LOCAL EMPLOYMENT DEVELOPMENT DEPARTMENT OFFICE
STATE OF CALIFORNIA

EMPLOYMENT DEVELOPMENT DEPARTMENT

Claims should be filed promptly. You may lose benefits to which you would otherwise be entitled if you delay filing of your claim.

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Motion and Brief *Amicus Curiae* were served, by first class mail, postage pre-paid, this 18th day of December, 1980, on the following:

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FILED
DEC 18 1980

No. 80-120

IN THE

Supreme Court of the United States

October Term, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH and NORTHWESTERN LUTHERAN ACADEMY,

Petitioners,

vs.

THE STATE OF SOUTH DAKOTA,

Respondent.

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA IN SUPPORT OF PETITIONERS

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BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA IN SUPPORT OF PETITIONERS

Statement of Interest

The State of California is vitally concerned with the outcome of the case at bar and strongly supports Petitioners' position that under the plain language of 26 U.S.C. § 3309(b)(1), the exemption provided therein is contingent upon who the employer is and is not contingent upon the type of services the employee is performing. The State of California further contends that under that criteria the South Dakota Supreme Court's decision is in error in holding that section 3309(b) of the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3311 ("FUTA"), requires church elementary and secondary school employees to be covered under state unemployment compensation laws. The South Dakota Court's decision adopted the 1978 interpretation of the Secretary of Labor ("Secretary") of section 3309 — an inter-

pretation with which the State of California strongly disagrees.[1]

Conformity proceedings under 26 U.S.C. §§ 3304 and 3310 were instituted against the State of California and nine other states for the year ended October 31, 1980. Although the proceedings were suspended as to California and seven of the other nine states for the year ended October 31, 1980, the Secretary expressly reserved the right to recommence the proceedings for the year ending October 31, 1981. (45 Federal Register 74796.) The results of non-conformity are indeed staggering. If the State of California was held to be out of conformity with FUTA, in excess of one billion dollars would be lost in the first year alone by California employers due to the elimination of the offsetting credit against the federal unemployment tax and by the State of California due to the elimination of reimbursement of administrative costs from the federal government.

Unquestionably, an interpretation of law such as the Secretary's, which has such tremendous implications must be closely scrutinized. The analysis must go beyond the South Dakota Court's cursory review. It is the State of California's position that such an analysis must result in rejection of the Secretary's interpretation and reversal of the decision of the South Dakota Supreme Court.

This brief is being filed by the State of California Attorney General pursuant to United States Supreme Court Rule 36.4.

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[1]The State of California supports the decision of the United States Court of Appeals for the Fifth Circuit in *States of Alabama & Nevada v. Marshall* (5th Cir. 1980) 626 F.2d 366. The Fifth Circuit's decision rejected the Secretary's 1978 interpretation and is directly contrary to the South Dakota Court's decision. A Petition for a Writ of Certiorari to this Honorable Court has been filed in the Fifth Circuit case (Docket No. 80-922). The State of California has joined with seven other states in urging this Honorable Court to grant the Petition for a Writ of Certiorari in the Fifth Circuit case and to grant the motion of Alabama and Nevada for consolidation with the case at bar.

Summary of Argument

The South Dakota Supreme Court's decision in the case at bar is incorrect. It ignores important issues, places excessive emphasis on an isolated statistic in a Senate Report and gives unwarranted deference to the Secretary's 1978 interpretation of the law.

The Secretary's 1978 interpretation of 26 U.S.C. § 3309(b) is entitled to no deference in that it is not a contemporaneous interpretation, it is inconsistent with the Secretary's actual contemporaneous interpretations and it is to this day inconsistent with current interpretations espoused by the Secretary.

The sections of FUTA must be interpreted according to their plain language unless a *clear* contrary legislative intention is shown. The plain language of 26 U.S.C. § 3309(b)(1) indicates that the exemption provided thereunder is contingent upon who the employer is and is not contingent upon the type of services the employee is performing. The reference to a bare statistic in a Senate Report unsupported by any background data or explanation in that report does not provide a clear contrary legislative intent.

The South Dakota decision does not discuss whether 26 U.S.C. § 3309(b)(1)*(A)* is applicable. Only 26 U.S.C. § 3309(b)(1)*(B)* is discussed. The South Dakota decision does not recognize that the South Dakota counterpart to 26 U.S.C. § 3309(b)(3) (prior to the 1976 amendments), SDCL 61-1-10.4(3), was not identical to its FUTA counterpart. Finally, although FUTA demands an inquiry into whether the common law employer-employee relationship exists for purposes of the exemption provided in 26 U.S.C. § 3309(b)(1), the South Dakota decision fails to discuss this issue at all.

ARGUMENT

I

The Secretary's 1978 Interpretation Is Entitled to No Deference

The interpretation which is the cause of the litigation in the case at bar as well as nationwide litigation and the conformity proceedings is the Secretary's 1978 interpretation of the deletion of 26 U.S.C. § 3309(b)(3) under the 1976 amendments to FUTA. That interpretation was embodied in two documents in 1978 — the Bishop Kelly letter (April 18, 1978) (see Opn. at 290 N.W.2d 845, 847) and Unemployment Insurance Program letter No. 39-78 (May 30, 1978) (see Joint Appen., p. A-40). In essence, as set forth in those documents, the Secretary's position in 1978 was that 26 U.S.C. § 3309 (b)(1)(B) had no application to church-related schools and 26 U.S.C. § 3309(b)(1)(A) applied only to those "strictly church duties" performed for more than fifty percent of the pay period by church employees at the church-related schools pursuant to their church responsibilities. Dismissing for the moment the erroneous nature of said interpretation, we urge this Honorable Court to note the following important facts which demonstrate that the Secretary's 1978 interpretation is entitled to *no* deference.

First, contrary to the statements of the South Dakota Supreme Court at 290 N.W.2d 845, 849, the Secretary's 1978 interpretation was not the same position the Department of Labor ("the Department") took immediately after Public Law 94-566 (the 1976 amendments to FUTA) was passed. The 1978 interpretation was not a contemporaneous interpretation of the 1976 amendments and was inconsistent with the actual contemporaneous interpretations of the Department.

On December 7, 1976, the Department issued a memorandum to all states entitled Supplement No. 1 — Questions and Answers Supplementing *Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976 — P.L. 94-566*. In this memorandum, the following question and answer appeared:

> "*Question*:
>
> "Do the 1976 amendments affect church-related schools?
>
> "*Answer*:
>
> "Yes, to the extent that coverage is extended to elementary and secondary schools. In other respects no changes were made, and the exclusion in sections 3309(b)(1), (2) . . . are still applicable . . . *For example, the coverage of nonprofit elementary and secondary schools does not affect the optional exclusion in 3309(b)(1)*." (See Petitioners' Petn. Appen. E, pp. A62-A63.) (Emphasis added.)

Therefore, in its most contemporaneous statement concerning the 1976 amendments to FUTA, the Department affirmed the applicability of the "optional" exemption provisions of 26 U.S.C. § 3309(b)(1) to church-related schools.

On February 2, 1977, the Department issued a second memorandum to the states entitled Supplement No. 2 — Questions and Answers Supplementing *Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976 — P.L. 94-566*. This memorandum was intended to explain the criteria for determining the aforementioned *conceded* applicability (in its December 7, 1976 memorandum) of 26 U.S.C. § 3309(b)(1) to church-related schools. In pertinent part, it provided:

> "Thus, under section 3309(b)(1), FUTA, it must first be determined whether the workers in question are employed by a church or by an organization other than the church. *If the workers are employed by a church,*

their services are excluded. Whether the church is the employer is primarily a question of fact. If, however, the workers are not employed by the church, it must then be determined whether the employing organization is operated primarily for religious purposes. If operated primarily for religious purposes, the services are excluded only if the employing organization is operated, supervised, controlled or principally supported by the church.

"The determination of whether the exclusion applies can be made only after a thorough analysis of the legal interests and relationships between the organization and the church.

"The changes made in Section 3309 by P.L. 94-566 do not change the application of the exclusions in section 3309(b)(1)(A) and (B)." (See Petitioners' Petn. Appen. F, pp. A64-A67.) (Emphasis added.)

Clearly, the Department's actual contemporaneous interpretations of the 1976 amendments to FUTA recognized that the exemption provisions of 26 U.S.C. § 3309(b)(1) continued to apply to church-related schools and that the crucial inquiry was to factually determine who or what was the "employing organization" of the employees in question. If the "employing organization" was a church, the exemption under (b)(1)(A) applied. If the "employing organization" was other than a church, then the two-part inquiry under (b)(1)(B) had to be conducted. It cannot be overemphasized that these contemporaneous interpretations are completely contrary to the Secretary's 1978 interpretations.

To further emphasize the lack of consistency of the Secretary's interpretations and/or positions, this Honorable Court should be made aware of the fact that the Secretary has recently espoused a "new" position in the trial court proceedings in *Grace Brethren, et al. v. State of California, et al.*, Case No. 79-093-MRP, USDC (C.D. Cal.) and *Lu-*

theran Church-Missouri Synod, et al. v. State of California, et al., Case No. 79-162-MRP, USDC (C.D. Cal.).

The "new" position of the Secretary was put forth at trial in oral argument. The "new" position is that *no teacher* other than ministers as defined in the statute, could ever be exempt under 26 U.S.C. § 3309(b) although some clerical personnel could be exempt. (R.T., pp. 127-129, of proceedings on Aug. 12, 1980; See Appendix.) *Nowhere* in the Bishop Kelly letter or Unemployment Insurance Letter No. 39-78 is such a statement found. *No distinction* is made in the 1978 interpretations between clerical personnel employed by the church and teachers employed by the church. Although this "new" position may be nothing more than a "litigating position", it is instructive in that it demonstrates the total lack of consistency of the Secretary's interpretations of FUTA.

From the above, it is evident upon several grounds that the Secretary's 1978 interpretation in question herein is not entitled to any deference. First, it is not a contemporaneous construction of FUTA. (See *General Electric Co. v. Gilbert* (1976) 429 U.S. 125, 142). Second, the interpretation has not remained consistent with earlier *or* later pronouncements of the Secretary. (*Id.*, at 142.) Finally, the interpretation contradicts the plain language of 26 U.S.C. § 3309(b)(1) and lacks any support from the pertinent legislative history. (*Id.*, at 145; *Hart v. McLucas* (9th Cir. 1976) 535 F.2d 516, 520.)

In all, it is obvious that this Honorable Court should accord *no* deference to the Secretary's 1978 interpretation. Since the South Dakota Supreme Court erroneously placed great emphasis on that interpretation, this Honorable Court should reverse that Court's decision as well.

II

No Clear Congressional Intention to the Contrary, the Plain Language of 26 U.S.C. § 3309(b)(1) Is Controlling

It is a familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a *clearly* expressed legislative intention to the contrary that language must ordinarily be regarded as conclusive. (*Consumer Product Safety Commission v. GTE Sylvania, Inc.* (1980) .... U.S. .... , 100 S.Ct. 2051, 2056; *United States v. Apfelbaum* (1980) .... U.S. .... , 100 S.Ct. 948, 952; *States of Alabama & Nevada v. Marshall, supra*, 626 F.2d 366, 368-9; see also *NLRB v. Catholic Bishop* (1979) 440 U.S. 490, 504-507. If a statute is plain and unambiguous on its face, there is no need for the Court to refer to the legislative history as a guide to its meaning. (*TVA v. Hill* (1978) 437 U.S. 153, 184, fn. 29; *Ex Parte Collett* (1949) 337 U.S. 55, 61; see also *Caminetti v. United States* (1917) 242 U.S. 470, 485.)

The plain and unambiguous language of 26 U.S.C. § 3309(b)(1)[2] indicates that the exemption provided thereunder is contingent upon who the employer is and is not contingent upon the type of services the employee is performing. *States of Alabama & Nevada v. Marshall, supra*, 626 F.2d 366, 369. If the employer is a church or convention or association of churches, the exemption under 26 U.S.C. § 3309(b)(1)(A) applies regardless of the type of services

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[2]26 U.S.C. § 3309(b)(1) provides:

(b) Section not to apply to certain service. — This section shall not apply to service performed —

(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches; . . .

performed. If the employer is an organization operated primarily for religious purposes which is operated, supervised, controlled or principally supported by a church or convention or association of churches, the exemption under 26 U.S.C. § 3309(b)(1)(B) applies, again regardless of the type of services performed.

The term "employer" is defined in FUTA as to include "any person who . . . paid wages . . . ." (26 U.S.C. § 3306(a)(1)(A).) The term "employee" is defined in 26 U.S.C. § 3121(d)(2) (which section is expressly made applicable to FUTA by 26 U.S.C. § 3306(i)) to include "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee." 26 C.F.R. § 31.3121(d)-1(c)(2) (1979) explains that an employer-employee relationship exists when the employer has the right to control the manner in which services are performed, has the right to discharge the person performing the services, and furnishes the place to work. The above definitions show that the concept of "employment" and the phrase "in the employ of", as used in 26 U.S.C. § 3309(b)(1), were intended to have their commonly understood, common law meaning under FUTA. Therefore, if the church or religious organization (under (b)(1)(B)) would be understood to be, under common law, the employer of the individuals in question then *all* services of such individuals would be exempt under 26 U.S.C. § 3309(b)(1).

It is clear that if Congress wanted to exempt only particular types of services of otherwise exempt employees it knew how to draft such language. The remaining permissible exemptions contained in 26 U.S.C. § 3309(b) demonstrate that point. The present subsections (b)(3), (b)(4) and (b)(5) of 26 U.S.C. § 3309 provide as follows:

"(3) in the employ of governmental entity referred to in paragraph (7) of section 3306(c), *if such service is performed by an individual in the exercise of his duties* —

"(A) as an elected official;

"(B) as a member of a legislative body, or a member of the judiciary, of a State or political subdivision thereof;

"(C) as a member of the State National Guard or Air National Guard;

"(D) as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood or similar emergency; or

"(E) in a position which, under or pursuant to the State law, is designated as (i) a major nontenured policymaking or advisory position, or (ii) a policymaking or advisory position the performance of the duties of which ordinarily does not require more than 8 hours per week;

"(4) *in a facility* conducted for the purpose of carrying out a program of —

"(A) rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, or

"(B) providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market,

by an individual receiving such rehabilitation or remunerative work;

"(5) *as part of* an unemployment work-relief or work-training program assisted or financed in whole or in part by any Federal agency or an agency of a State or political subdivision thereof, by an individual receiving such work relief or work training; . . ." (Emphasis added.)

In these subsections, Congress spoke of services in the exercise of "duties as", services "in a facility", and services "as part of . . . [a] program". Subsection (b)(3) is particularly enlightening because Congress qualified its initial words "in the employ of" with the words "if such service is performed by an individual in the exercise of his duties — as . . . ." Clearly, if the Secretary's 1978 interpretation was correct, Congress could have qualified subsection (b)(1) similarly. As no such qualification appears in that latter subsection, it would appear that Congress never intended the meaning the secretary seeks to impute thereto.

In this connection, it is important to note that the 1970 House of Representatives Report which accompanied the adoption of 26 U.S.C. § 3309(b)(1) supports the above and states that the focus is on who is the employer and not on what duties are performed by the employee. (See H.R. Rep. No. 91-612, 91st Cong., 1st Sess. 44 (1969).)

From the foregoing, it is readily apparent that the language of 26 U.S.C. § 3309(b)(1) is plain and unambiguous on its face. Therefore, unless there is a *clearly* expressed legislative intention to the contrary the language of the statute is controlling.

In rendering its decision, the Supreme Court of South Dakota relied heavily upon the bare statistic found in a statistical table in the Senate Report which accompanied the 1976 amendments of the estimated number of employees (242,000) of nonprofit organizations to be added to coverage under P.L. 94-566. (See Sen. Rep. No. 1265, 94th Cong., 2d Sess. 8 (1976).) This isolated statistic can only have limited value because nowhere in the legislative history is there an explanation of its origins, how it was developed or what employees it included, no showing of any background data and no evidence of any Congressional understanding of the alleged significance of the figure. Surely,

the inclusion of the bare statistic in the Senate Report without explanation is not a clearly expressed legislative intention that contrary to the plain and unambiguous language of 26 U.S.C. § 3309(b)(1), employees of churches performing services in church-related elementary and secondary schools were not to be exempt under FUTA.

Furthermore, apart from the limited value such a statistic can have, a careful analysis of the 242,000 figure reveals that it does not prove that which the South Dakota Court thought it did. The South Dakota Court cites as support for its conclusions the Census Bureau's Statistical Abstract of the United States (1977 ed.). Table 237 at page 147 of that publication indicates that there were 261,000 *classroom teachers* in nonpublic elementary and secondary schools in 1975. This figure exceeds by 19,000 the figure used in the Senate Report. Moreover, it must be noted that the 261,000 only includes *classroom teachers*. It does not include such employees as principals, secretaries, nurses, counselors, bus drivers, cafeteria workers, or custodians as well as part-time and substitute teachers. The South Dakota Court's analysis either ignores this point or merely never considered it. Nevertheless, its analysis is insufficient and must be rejected.[3]

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[3]Moreover, to further question the South Dakota Court's heavy reliance upon this isolated figure as a "clear" indication of Congressional intent, it is certainly just as plausible that Congress was cognizant of the national problem in the mid-1970's, definitely present in California, of increasing lay-offs in public elementary and secondary schools of public school employees due to the combination of diminishing availability of public funds and declining enrollments. It could also be concluded that coverage of private schools was not the major factor affecting Congressional intent. In addition, it is reasonable to assume that Congress was aware that not only full-time classroom teachers, but also other school employees were likely to be laid off and therefore to benefit from Congress' extension of coverage.

As other examples are surely possible, it becomes readily apparent that the South Dakota Court's reliance upon the isolated 242,000 figure as a clear indication of Congressional intent was misplaced.

Accordingly, it is obvious that the isolated tabular figure of 242,000 is not a clear expression of contrary Congressional intent. Consequently, the plain language of 26 U.S.C. § 3309(b)(1) is controlling.

III

The South Dakota Decision Did Not Consider Major Issues Necessary to Decide This Case.

The decision of the South Dakota Supreme Court did not discuss three major issues which should be considered by this Honorable Court.

First, although the dissent notes at 290 N.W.2d 845, 854, that petitioner St. Martin Evangelical Lutheran Church is not a separate entity from St. Martin Evangelical Lutheran School and that it operates said school, no discussion is made by the majority of the applicability of 26 U.S.C. § 3309(b)(1)(*A*). Only 26 U.S.C. § 3309(b)(1)(*B*) is discussed. In light of the previous discussion regarding who is the employer, such an omission further mandates reversal of the decision.

Second, it should be noted that South Dakota law prior to the 1976 amendments differed in a material manner from the provisions of FUTA. Prior to 1976, SDCL 61-1-10.4(3) provided an exemption for services performed "in the employ of a school other than a *state* school which is not an institution of higher education." (Emphasis added.) Prior to 1976, 26 U.S.C. § 3309(b)(3) read the same as above except that the word "state" was omitted.[4] This difference in the laws does not save the South Dakota decision. The statistical analysis which appears in the decision, which has been shown to have very limited value, *supra*, would seem

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[4]California Unemployment Insurance Code section 634.5(c) likewise omitted the word "state".

to have even less significance as to South Dakota's law. There is no evidence, with respect to the statistical analysis, that Congress was aware of the fact the exemption contained in the prior South Dakota statute was significantly *narrower* than the exemption contained in FUTA and that the deletion thereof would result in significantly *fewer* employees being added to coverage under South Dakota law than would be added under FUTA (or under laws of states such as California). Although the South Dakota Court never addressed this difference, this Honorable Court should be cognizant of that fact.

Finally, although FUTA unquestionably requires an inquiry into whether the common law employer-employee relationship existed with respect to the petitioners in the case at bar, the South Dakota decision does not discuss the issue. In light of the previous discussion of the plain language of FUTA, the lack of such discussion in its opinion further demonstrates that the South Dakota Court's decision should be reversed.

Conclusion.

For the foregoing reasons, it is respectfully requested that this Honorable Court reverse the decision of the South Dakota Supreme Court.

Respectfully submitted,

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APPENDIX

THE COURT: All right. Let's take this time to explore one or two questions here.

I have been considering at the break your position this morning, Mr. Sheinfeld, and now I want to ask you, if you will, just let's see if we can pursue this a little bit further.

The position of the Secretary has been and is, and you correct me if I am wrong, that no schools, no school employees are within the exemption or the exclusion.

MR. SHEINFELD: That is a correct statement of the position.

THE COURT: So that if, as in the testimony that we had today, a teacher is engaged in teaching the Bible, which is where I started with the hypothetical this morning — I gave you a hypothetical in which what I was thinking was that for the seven periods a day or six periods a day that that teacher taught, that teacher taught the Bible or taught moral instruction. Now, that teacher is not excluded?

MR. SHEINFELD: Unless that teacher is a minister as defined in the statute, no, he is not excluded, your Honor.

THE COURT: And it wouldn't make any difference whether that teacher worked for the church or worked for an organization which is dominated by a church?

MR. SHEINFELD: No, it would not, your Honor.

THE COURT: All right. Now then, let me ask you: What is it that you understand, what kind of an examination of the records of a school like this should be done by the state auditors to determine how much of the time is exempt and how much of it is not exempt?

MR. SHEINFELD: With respect to the teachers, none, your Honor.

THE COURT: So that when they go in to audit a school, what they should be asking first is: "How many ministers do you have on your teaching staff?" If the person were a minister, then you would say there would be a possibility of exemption, wouldn't you?

MR. SHEINFELD: There is an exemption for ministers, your Honor, yes.

THE COURT: Yes, if they can establish that they are a minister. When I say "possibility," what I mean is that they'd have to establish factually that they were a minister.

MR. SHEINFELD: Yes, that is true.

THE COURT: All right. Now, what else? Is there anybody else on the staff who would be excluded?

MR. SHEINFELD: Well, beyond the teachers there I suppose there are support personnel. There may be secretaries, other clerical people, nurses perhaps.

THE COURT: They would be exempt because they are in the employ of a church; is that right?

MR. SHEINFELD: Excuse me, your Honor. I didn't hear you.

THE COURT: They would be exempt because they are in the employ of a church?

MR. SHEINFELD: Not, your Honor, to the extent that they are — their activities, their work activities are in the furtherance of the school function.

THE COURT: So what would you be asking about those secretaries, taking that hypothetical? Let me put it this way: If they are sending out church bulletins even though they are located in the area of the school, that part of their time you would say is exempt?

MR. SHEINFELD: Yes, your Honor, I would.

THE COURT: And yet, you would not say that the teacher who teaches a Bible study is exempt?

MR. SHEINFELD: Not as part of the regular school curriculum, no.

THE COURT: Now even you must see just how preposterous that is.

MR. SHEINFELD: Your Honor, it is difficult, yes.

THE COURT: Mr. Sheinfeld, I don't want to put you in a box. I'm just telling you that it is inconceivable that you could have an employee — or doesn't it seem to ....

No. 80-120

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH, and NORTHWESTERN LUTHERAN ACADEMY
Petitioners

v.

THE STATE OF SOUTH DAKOTA,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF GERMANTOWN FRIENDS SCHOOL AND FRANKFORD FRIENDS SCHOOL AS AMICI CURIAE

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

1. Germantown Friends School and Frankford Friends School, Quaker primary and secondary schools located in Philadelphia, Pennsylvania, hereby apply for leave to submit the attached brief as amici curiae.

2. Pursuant to Rule 36.2 of the Rules of this Court, consent to the filing of this brief was requested from both parties to this case. Petitioners have granted written consent to the filing of this amicus brief; however, respondent State of South Dakota has not granted its consent.

3. In determining whether or not religious schools may, consistent with the statute and the Constitution, be made subject to the unemployment

compensation laws, this Court's decision will have a direct impact upon the amici. The amici, for the past three years, have been litigating the issues raised in the instant case before the Pennsylvania Bureau of Employment Security, the Eastern District of Pennsylvania, the Third Circuit Court of Appeals, and the Commonwealth Court of Pennsylvania. Amici believe that being made subject to the Federal Unemployment Tax Act ("FUTA") will seriously impede their religious mission, and subject them to governmental scrutiny and entanglement, all in contravention of the Constitution and the express intent of their elected officials.

4. Amici, to their knowledge, are the sole representatives in this proceeding of the Religious Society

of Friends, known as the Quakers. These Quaker schools are among the oldest religious primary and secondary schools in America. Amici believe that their distinctive approach to education, relation to their religious community, and religious heritage merit the Court's attention as it considers whether and which religious schools should be held exempt from FUTA.

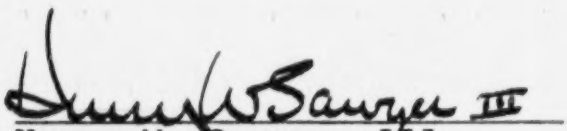
5. Amici's brief raises a constitutional argument which, to their knowledge, has not been presented in the other briefs in this proceeding, namely, that the First Amendment forbids distinguishing among demonstrably religious schools on the basis of their organizational structure or practice.

CONCLUSION

For the foregoing reasons, the amici respectfully request this

Court to grant their motion to file the attached brief as amici curiae.

Respectfully submitted,



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INTEREST OF THE AMICI CURIAE

Germantown Friends School and Frankford Friends School were established in 1845 and 1760, respectively, for the purpose of providing children with an education immersed in the Quaker faith and lifestyle. A century and half later, there has been no diminution in the schools' primary and essential commitment: "to develop [the] spirit, mind and body of each student so that all may become more effective instruments for carrying out the Divine will, that is the will of God."[1] Each is overseen by a School Committee appointed

1. Germantown Friends School v. Pennsylvania Department of Labor and Industry, No. 940 C.D. 1979 (Pa. Cmwlth. Ct. 1979), Reproduced Record at 84a, [hereinafter cited as Germantown Record].

by its respective Monthly Meeting of Friends. As religious schools, they are prohibited under the Establishment Clause decisions of this Court from receiving most forms of state assistance.

The amici, since 1977, have been engaged in both federal and state court litigation with respect to the issues presently before this Court. The District Court for the Eastern District of Pennsylvania held, on the basis of the Tax Injunction Act of 1937, that it lacked jurisdiction to decide the merits of the case,[2] which decision was affirmed by the

2. Germantown Friends School v. Joseph, No. 79-1539 (E.D. Pa. Sept. 6, 1979); Frankford Friends School v. Joseph, No. 79-1540 (E.D. Pa. Sept 6, 1979).

Third Circuit Court of Appeals.[3] The Commonwealth Court of Pennsylvania[4] has heard oral argument on the merits of the case, but has not yet rendered an opinion.

The case now before this Court concerns the interpretation and constitutionality of the Federal Unemployment Tax Act ("FUTA"), as applied by the Department of Labor and the State of South Dakota to religious schools. The amici have at least two

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3. Frankford Friends School v. Joseph, No. 79-2513 (3rd Cir. July 1, 1980) (affirmed without opinion); Germantown Friends School v. Joseph, No. 79-2512 (3rd Cir. July 1, 1980) (affirmed without opinion). Both dispositions are noted at 624 F.2d 1090 (1980).

4. Germantown Friends School v. Pennsylvania Department of Labor and Industry, No. 940 C.D. 1979 (Pa. Cmwlth. Ct., 1979); Frankford Friends School v. Pennsylvania Department of Labor and Industry, No. 939 C.D. 1979 (Pa. Cmwlth. Ct., 1979).

reasons for submitting this brief to the Court. First, to their knowledge they are the sole representatives in this proceeding of a distinctive and historic religious faith and heritage, that of the Quakers. Secondly, the manner in which these schools are operated and the nature of their relationships with their sponsoring religious organizations may be somewhat different than that of the petitioners in this case. Should this Court find petitioners to be exempted from FUTA's coverage, the amici urge that the Court's opinion be phrased broadly enough to include within its scope the amici.

QUESTIONS PRESENTED

1. Whether, consistent with FUTA and the Religion Clauses, the government may exempt some religious schools from FUTA while including others, solely on the basis of distinctions in their polity and practice.

2. Whether religious schools come within the exemptions of FUTA for services performed for a "church" or an organization "operated primarily for religious purposes."

3. Whether subjecting religious schools to FUTA violates the Religion Clauses of the First Amendment.

SUMMARY OF ARGUMENT

It was never the intent of Congress, and it is not consistent with the First Amendment, to subject religious schools to the unemployment compensation laws. The plain language of the statute provides religious schools with two applicable exemptions: employment in such schools constitutes employment both for a "church" and for an organization "operated primarily for religious purposes." Subjecting religious schools to FUTA, in the absence of any clear, affirmative congressional intent to do so, and in the face of potential infringements of the schools' First Amendment rights, would run directly counter to this Court's decision in Catholic Bishop

of Chicago. Moreover, the application of the law to religious schools impermissibly infringes their free exercise rights and excessively entangles church and state.

Finally, the decision of the Secretary of Labor giving rise to this case has been given nationwide effect. Religious schools of various faiths, denominations and sects and with differing organizational structures have been affected, in contravention of both the statute and the Constitution. The identical issue is being litigated in various state and federal courts. Should this Court find in favor of petitioners, it would avoid further protracted litigation across the Country if the Court's opinion is

made clearly applicable to all religious schools.

ARGUMENT

I. IN ITS DECISIONS CONSTRUING THE RELIGION CLAUSES, THIS COURT HAS NEVER DISTINGUISHED AMONG DIFFERENT TYPES OF RELIGIOUS SCHOOLS

A. Recent Trends to Arbitrarily Distinguish Among Types of Religious Schools

One of the most disturbing elements of the application of FUTA to religious schools, and the recent litigation surrounding these issues, is the artificial distinctions that have been drawn between various types of religious schools. For purposes of determining whether religious schools are exempted from FUTA, "church schools" have been distinguished from "church related" and "parent operated" schools;

and numerous other secondary factors related to religious polity and practice have been cited by agencies and courts as being significant.[5] The amici assert that under the Religion Clauses as interpreted by this Court such distinctions are impermissible and provide no workable guidelines for the exercise of administrative discretion.

B. The Nature of the Amici.

Amici are Quaker schools. Frankford Friends School has been in operation since the Colonial era; Germantown Friends School since the early nineteenth century.

A Friends school is a place where "God is above all else," and

5. See e.g., Alabama v. Marshall, 626 F.2d 366, 368 (1980) (separate legal existence, employees hired by church officials, ownership by church of school buildings, employees paid from church accounts).

"the centrality of God pervades the daily living."[6] There are weekly meetings of worship in the schools which are conducted in the Quaker manner of silent worship. The testimony of the Friends schools is not in proselytizing, but in evidencing in all activities Friends' beliefs in peace, simplicity, brotherhood, and the light of God in every person.

Each of these Friends schools is overseen by a Monthly Meeting of Friends, which is equivalent to a local church. Each Monthly Meeting is autonomous and owns its own property. The land and facilities used by the schools are owned by the Monthly Meetings and are made available to the schools rent-

6. Germantown Record, supra note 1, at 114a.

free. In addition, the Monthly Meetings make annual contributions to the schools to be used for scholarships and for the library.

The bulk of the resources of the schools is derived from tuition payments. Other sources of income include endowments and donations from members of the Meetings and parents and friends of the schools. The schools derive virtually no aid from the state since they have been deemed to come within the Establishment Clause decisions of this Court. (As a specific consequence of this Court's decision in Lemon v. Kurtzman,[7] reimbursement provided by the Commonwealth of Pennsylvania to these schools was terminated.) For administrative convenience, the

7. 403 U.S. 602 (1971).

schools' payrolls are separate from those of the Monthly Meetings.

The activities and policies of the schools are determined and overseen by the School Committees of their respective Monthly Meetings. The School Committees are selected by the Monthly Meetings and are composed primarily, in the case of Germantown Friends School, and exclusively, in the case of Frankford Friends School, of members of the Monthly Meetings. The School Committees each appoint a headmaster who is responsible for the day-to-day operations of the schools. The School Committees regularly report the activities and affairs of the schools to the Monthly Meetings, which retain ultimate authority over the schools.

About one-third of the faculty and approximately 8% and 3-1/2%, respectively, of the students at Germantown Friends School and Frankford Friends School are Quakers. As long as they are sympathetic to the teachings of the Quakers, parents of any faith may send their children to the schools.

C. In Applying the First Amendment to Religious Schools, This Court Has Never Drawn Distinctions Based on Organization or Practice

With respect to the manner in which religious schools are organized and run, there tend to be both commonalities among schools of the same sect and notable distinctions between the schools of differing faiths. Hence, making such distinctions between religious schools may have the effect of

discriminating between religious faiths based on the form of their worship.

This Court has repeatedly indicated that such distinctions are constitutionally forbidden. In NLRB v. Catholic Bishop of Chicago it stated:

> We find the standard itself to be a simplistic black or white, purported rule containing no borderline demarcation of where 'completely religious' takes over or, on the other hand, ceases. In our opinion the dichotomous 'completely religious - merely religiously associated' standard provides no workable guide to the exercise of discretion.

440 U.S. 490, 495 (1979) quoting 559 F.2d 1112, 1118 (1977).

In Sherbert v. Verner 374 U.S. 398 (1963), the Court emphasized the "governmental obligation of neutral-

ity in the face of religious differences." Id. at 409. Moreover, in Braunfeld v. Brown, 366 U.S. 599 (1961) the Court declared

> [i]f the purpose or effect of a law is to... discriminate invidiously between religions, that law is constitutionally invalid.... Id. at 607.

Other decisions of this Court regarding religious schools lead inescapably to the conclusion that, where government proposes either to grant a benefit or impose a burden, the only distinction permissible under the First Amendment is whether a school is demonstrably and genuinely religious in nature. Further distinguishing between religious schools on the basis of differences in structure or practice would itself constitute a violation

of their religious liberties and this Court's mandate that "no religion be . . .favored . . . and none inhibited."[8]

---

8. Walz v. Tax Commission, 397 U.S. 664, 669 (1970). Such liability-determinative classifications would constitute governmental discrimination based on the form of worship. This Court has stated in Cantwell v. Connecticut, 310 U.S. 293 (1940), that "freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law . . . The Religion Clauses safeguar[d] the free exercise of the chosen form of worship." Id. at 303-04 (emphasis added). In Abington School Dist. v. Schempp, 374 U.S. 203 (1962), the Court reiterated this theme by stating that "the Free Exercise Clause . . . recognizes the value of religious training, teaching, and observance, and, more particularly, the right of every person to freely choose his own course with reference thereto, free from any compulsion from the state." Id. at 222 (emphasis added).

II. NEITHER THE EXPRESS PROVISIONS OF THE STATUTE NOR THE ASCERTAINABLE INTENT OF CONGRESS SUPPORTS THE IMPOSITION OF FUTA ON RELIGIOUS SCHOOLS

A. The Lack of Congressional Intent

American churches and religious schools have historically been treated with a "benevolent neutrality"[9] by the Congress and the legislatures of the various States. In general, taxation of religious entities has been scrupulously avoided. There is not a whit of evidence in the relevant legislative materials that Congress ever contemplated that, by the mere deletion of a single clause, it would suddenly sweep thousands of religious schools, and tens of thousands of religious school teachers in all fifty

9. Walz v. Tax Commission. 397 U.S. 664, 676 (1970).

states, within the ambit of FUTA's taxation and regulation. There is not a single reference to "religious" or "church related schools," no study of the constitutionality or impact of such a breach with the past, no testimony received from religious leaders, and no statements made by any members of Congress concerning the impact on religious schools.[10] If Congress intended to produce the result argued by respondents, it was achieved with an astonishing and unprecedented degree of silence.

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10. See Alabama v. Marshall, 626 F.2d 366, 368 (1980); Recommended Decision, J.A. at A-31 & 32. For a discussion of the legislative history of the 1976 FUTA amendments and an analysis of the issues presented in this case, see generally, Comment, Bringing Christian Schools Within the Scope of the Unemployment Compensation Laws: Statutory and Free Exercise Issues, 25 VILL. L. REV. 60 (1979-80).

It was against this backdrop of legislative silence that the Secretary of Labor deduced, ex nihilo, a Congressional mandate to impose the unemployment tax and its concomitant regulation upon the schools. The Secretary's decision to bring the schools within FUTA's scope came only "after over a year of equivocation," Alabama v. Marshall, 626 F.2d 366, 368 (1980), and amounted to a complete reversal of the Department's earlier position issued just after the 1976 amendments. Recommended Decision, J.A. at A-28 & 29.

This Court's recent decision in NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979), affords a very close precedent to the instant case. The basic principle of Catholic Bishop

of Chicago would appear to be that application of a statute to church-related entities will not be upheld where it implicates sensitive issues of religious faith and practice, or creates the potential for infringement of important First Amendment rights, if it is not manifest that the legislature acted clearly, expressly, and affirmatively. The essential policy consideration involved is that only elected officials should make decisions where religious freedom is concerned, so that there may be public input, open debate, and thorough review. Such action should not emanate from the closed meetings of administrative agencies, as was the case in the Secretary's decision.

B. The "Plain Meaning" of the Statute

Reinforcing the conclusion that Congress never intended to eliminate the exemption of religious schools from FUTA is the fact that the 1976 amendments retained intact the section 3309(b)(1)(A) and (B) exemptions for employment in churches and organizations operated primarily for religious purposes. The statute involved in Catholic Bishop contained no similar exemptions. The amici assert that they come within the "plain language" of both of these provisions.

1. The Section 3309(b)(1)(A) "Church" Exemption

The amici contend that services performed by their employees are

services performed in the employ of a "church" for the purposes of section 3309(b)(1)(A). Clearly the Monthly Meetings of Friends which oversee these schools are "churches" for all legal purposes. The Schools themselves are offspring of the parent Monthly Meetings, created and operated to further the religious mission of the Society of Friends. The education of youth in religious schools has always been a deeply held commitment of the Quakers, who, in obedience to perceived Scriptural mandates, founded these educational institutions. Today they represent some of the oldest religious elementary and secondary schools in the Nation. They are uniquely suited to the achievement of vital objectives of the Monthly

Meetings: to promote future generations of faithful worshippers and to reach out to their communities with the teachings and values of Quakerism.

As counsel for the Department noted in her memorandum to the Secretary of Labor:

> this position [bringing religious schools within FUTA's scope] ... does [pose] numerous interpretative problems relating to... legal organization and interrelationship of "churches" and "schools" (e.g., episcopal, congregational, representative government structures) by placing a premium on legal employment and ignoring the educational activity as the basis for the former exemption. Thus, a religious body organized along episcopal lines obtains a highly centralized authority over the affairs of local bodies and their activities, tending to merge the "church" and the "school" under a single umbrella.... [A] nice question is presented as to whether

> any exemption should be determined merely by the form of business association a particular organization elects rather than on the basis of the activity performed, i.e., the operation of an elementary or secondary school.

Memorandum for the Secretary, J.A. at A-49.

2. The Section 3309(b)(1)(B) Exemption for Organizations "Operated Primarily for Religious Purposes"

The amici believe that they also clearly come within the FUTA's exemption for "an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church...."

The test for meeting Section 3309(b)(1)(B) is two-pronged. An organi-

zation, to qualify, must first demonstrate that it is operated primarily for religious purposes. Amici believe that they come within this Court's description of the religious schools involved in Catholic Bishop:

> If history demonstrates, as it does, that Roman Catholics founded an alternative school system for essentially religious reasons and continued to maintain them as an 'integral part of the religious mission of the Catholic Church,'... courts and agencies would be hard pressed to take official or judicial notice that these purposes were undermined or eviscerated by the determination to offer such secular subjects as mathematics, physics, chemistry and English literature."

440 U.S. at 496 quoting 559 F.2d 1112, 1118 (1977).

The second prong of the test is that the schools be "operated, super-

vised, controlled, or principally supported by a church..." (Emphasis added.) There is no question but that this test is met by the amici. Their respective Monthly Meetings of Friends "operate" and maintain ultimate "control" over the schools; thus, any decision to terminate the schools or to move their physical location would have to be taken by the Monthly Meetings. The Monthly Meetings also "supervise" the schools through the frequent meetings of their School Committees, which provide continuous oversight.

Quakers adhere to a unique process of collective decisionmaking, in which proposed decisions are discussed until all members are united

in the Divine Will. This process has become popularly known as "the sense of the Meeting." To Quakers, the evidence of "supervision" and "control" is less in an hierarchical structure than in a course of conduct prayerfully arrived at, demonstrating conformity with the will of God as revealed to the Meeting.

III. SUBJECTING RELIGIOUS SCHOOLS TO THE PROVISIONS OF FUTA VIOLATES THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT BY BURDENING THE SCHOOLS' RELIGIOUS MISSION AND BY EXCESSIVELY ENTANGLING CHURCH AND STATE.

The burdens which FUTA impose on amici are more than potentialities; the schools have already directly experienced the oppressive taxation and regulation inherent in the statute. Moreover,

the application of FUTA to religious schools will have the effect of excessively entangling church and state.

Although this is a Free Exercise case, and the decisions of this Court discussing the factor of "excessive entanglement" of church and state have primarily arisen under the Establishment Clause, Catholic Bishop of Chicago recognized that this concept goes to the heart of both Religion Clauses and is applicable here. 440 U.S. at 499.

A. The Tax

The most obvious and direct of FUTA's burdens on the religious schools is the tax itself, which is often very substantial. For instance, Germantown Friends School was assessed

contributions in the approximate amount of $16,800 for a single year.[11]

This Court has never held that the taxation of religious organizations is per se unconstitutional. However, this Court's decision in Walz v. Tax Commission, 397 U.S. 664 (1970) implies that a tax which excessively burdens religious schools in the absence of a compelling state interest is impermissible.

The imposition of the tax, with its associated oversight, enforcement, and collection provisions, also entails potential entanglement. As this Court stated in Walz, with respect to state real estate taxation:

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11. Germantown Friends School v. Pennsylvania Department of Labor and Industry, No. 940 C.D. 1979 (Pa. Cmwlth. Ct. 1979), Brief for Petitioner at 35 & 36.

> "Elimination of [tax] exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontation and conflicts that follow in the train of these legal processes."

397 U.S. at 674.

B. Reporting and Recordkeeping Requirements

Like most tax statutes, the unemployment tax laws monitor the compliance of subject institutions by requiring detailed reports and records. As applied to religious schools, FUTA's recordkeeping and reporting requirements are fraught with unconstitutional burdens and entanglements.

In Pennsylvania, for instance, each employer is required to keep "clear, accurate and complete employment and

payroll records" regarding each employee.[12] There is also a four year retention requirement for certain business records, such as cash journals, ledgers, and corporate minutes, in order to provide the Bureau of Employment Security with extensive and exceedingly detailed employment information. The schools will be required, at additional cost and time, to train personnel to compile and present the data.

Moreover, because FUTA requires coverage only of employees who spend more than half of their time engaged in non-exempt services,[13] the schools will be required to determine, and

12. 43 P.S. §766. See also 34 Pa. Code §63.51 et seq.

13. I.R.C. §3306(d). See Directive: Unemployment Insurance Program Letter No. 39-78 J.A. at A-43.

the government will be required to investigate, what percentage of an employee's time is spent serving the church directly, and what percentage is spent serving the school.

In addition to these burdens, the reporting and recordkeeping requirements of FUTA have an even greater potential for creating excessive entanglement. In general, the application of FUTA to religious schools requires the state unemployment agencies to draw innumerable subtle distinctions between "secular" and "sacred".

For example, throughout the administrative hearing in which amici's initial tax assessment was challenged, the hearing examiner called on the representatives of the schools to

specify those activities of the schools which are purely religious. He challenged them to explain how religion enters into the teaching of spelling or mathematics and to explain how the schools determine whether a prospective teacher is sympathetic to Quaker ideals and beliefs.[14]

The unemployment laws also require that religious schools be subject to state audit of their extensive employment records. See, e.g., 43 P.S. §§761 & 875.[15] This policing

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14. Germantown Record, supra note 5, at 93a, 102a, 104a-105a, 114a, 117a, 119a, 121a.

15. Section 875 is designated "Periodic Spot Checks and Investigation." It is interesting that in Lawrence E. Weatherford's Memorandum, J.A. at A-36, there is a discussion of how administrators are to "test" the extent of "strictly religious" services in a

(continued)

of the regulations raises the spectre of bureaucrats in religious school classrooms, verifying among other things, that teachers reported as exempt are devoting more than half their time to "primarily religious" pursuits. Such activity would clearly constitute "excessive entanglement" of a nature found to be impermissible by this Court in Lemon v. Kurtzman:

> In particular the government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate

15. (continued)

religious school. The Memorandum concludes:

> The determination of whether the exclusion applies can be made only after a thorough analysis of the legal interests and relationships between the oganization and the church.

J.A. at A-39.

> and continuing relationship between church and state.

403 U.S. 602, 619-20 (1971).

If allowed to continue unchecked, this governmental process of attempting to separate activities of a community of worshippers into discrete secular and religious components on the basis of governmental standards may undermine the freedom and independence of religion in America. Since its inception, this Court has carefully protected the rights of religious organizations to independently determine matters of faith and polity.[16] Implicitly recognized in these cases is the right of churches to determine

16. Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952); Cantwell v. Connecticut, 310 U.S. 296 (1940).

within reason which of their activities are, and which are not, "religious."

C. Good Cause Litigation

A third serious impact of the unemployment compensation laws on religious schools is their potential to draw schools into costly and burdensome litigation over the issue of whether employment was terminated for "good cause." For a religious school electing the reimbursement method of payment, "good cause determinations" could seriously affect the school's financial status because if the school prevails, it pays nothing; but if it loses, full reimbursement is required. In this regard, "good cause" determinations could chill a decision to dismiss a teacher for engaging in or advocating

secularly acceptable but religiously prohibited conduct. The government would be empowered to decide whether a religious school's action, taken on the basis of religious standards, constitutes "good" cause under the prevailing standards of the State Labor Bureau.

The District Court in Grace Brethren noted that "good cause" litigation also carries the potential for serious entanglement:

> disputes unquestionably will arise in situations where employees are dismissed for cause and the reason given by the church school is a failure to adhere to religious tenets of the church.
>
> The type of inquiry necessary to the resolution of controversies such as these is almost identical to that which the Court found to involve dangers of excessive entanglement in Catholic Bishop.... Such an inquiry taken by itself, involves impermissible entan-

> glement of the state with the church, violative of the separation of those entities mandated by the Constitution.

Grace Brethren Church v. California, Nos. CV 79-93 MRP, CV 79-162 MRP, slip op. at 12 (C.D. Cal. Sept. 21, 1979).

CONCLUSION

It would be fundamentally unfair to hold that these religious schools, which under Lemon v. Kurtzman have been held to be too religious to receive public assistance, are insufficiently religious to come within the exceptions for religious organizations which are contained in FUTA. As the Seventh Circuit stated in its opinion in Catholic Bishop of Chicago v. N.L.R.B., the government is

> cruelly whip-sawing their schools by holding that institutions too religious to

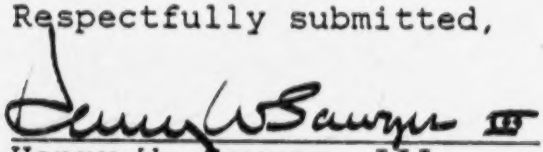
> receive government assistance are not religious enough to be excluded from its regulations.

559 F.2d 1112, 1119 (1977).

The courts in every jurisdiction which have reached the merits of this issue (except for the court below) have decided in favor of the religious schools. The Constitution, the decisions of this Court and the plain language and legislative history of the statute stand as three eloquent witnesses of the wisdom of those decisions.

Accordingly, the judgment of the Supreme Court of South Dakota should be reversed.

Respectfully submitted,



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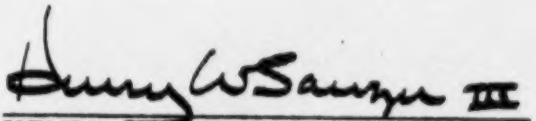
CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Motion for Leave to File Brief and Brief of Germantown Friends School and Frankford Friends School as *Amici Curiae* were served this 18th day of December 1980, by mail, postage prepaid, on Edward Thomas Schilling, Esq. 757 North Broadway, Suite 500, Milwaukee, Wisconsin 53202, counsel for petitioners in No. 80-120; and Judith A. Atkinson, Esq., Assistant Attorney General, Office of the Attorney General, State Capitol, Pierre, South Dakota 57501, counsel for Respondent in No. 80-120.



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FILED
1980

NO. 80-120

In The

Supreme Court of the United States

October Term, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH *et al.*,

Petitioners,

vs.

STATE OF SOUTH DAKOTA.

On Petition for a Writ of Certiorari to the Supreme Court of South Dakota

MOTION OF GRACE BAPTIST TEMPLE, PRATTVILLE, ALABAMA AND THE ALABAMA CHRISTIAN EDUCATION ASSOCIATION, INC. FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF GRACE BAPTIST TEMPLE, PRATTVILLE, ALABAMA AND THE ALABAMA CHRISTIAN EDUCATION ASSOCIATION, INC. AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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NO. 80-120

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Supreme Court of the United States

October Term, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH *et al.*,

Petitioners,

vs.

STATE OF SOUTH DAKOTA.

On Petition for a Writ of Certiorari to the Supreme Court of South Dakota

MOTION OF GRACE BAPTIST TEMPLE, PRATTVILLE, ALABAMA AND THE ALABAMA CHRISTIAN EDUCATION ASSOCIATION, INC. FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Pursuant to Rules 36 and 42 of the Rules of the Supreme Court of the United States, Grace Baptist Temple, Prattville, Alabama (hereinafter "Grace") and the Alabama Christian Education Association, Inc. (hereinafter ACEA) hereby move for leave to file the attached amicus curiae brief in support of the Petitioners herein.[1] In support of this motion, applicants show to the Court the following as to their interest and facts or questions of law that have not or will not adequately be presented by the parties.

1 Consent to applicants' participation has been granted by Petitioners but was denied by Respondent.

ACEA is a non-profit corporation formed to inform, represent, and to protect fundamental churches in their educational ministries in the State of Alabama. Its membership consists of 74 churches. Grace Baptist Temple is a non-profit corporation located in Prattville, Alabama, and a member of ACEA.

Grace and the members of ACEA are churches located in the State of Alabama. They are fundamental churches which believe in and obey the Bible as the inspired and inerrant Word of God. They are predominantly independent Baptist churches, although several other denominations are included. As to the issues presented to the Court herein, their beliefs and practices are identical in all material respects.

Grace and the members of ACEA operate many "ministeries", i. e., activities of their churches which have as their sole purpose some biblical objective. Among these ministries are Christian schools. The Christian schools are entirely religious in scope, being motivated by religious considerations and maintained solely to accomplish religious objectives. All of the activities in said Christian schools are conducted from a biblical Christian perspective.

None of the schools are separately incorporated or otherwise separate legal entities. All persons employed to work in the school ministries are employed by the respective churches. They are church staff.

Grace and ACEA have participated in other litigation involving issues similar to those presented to the Court herein. They obtained a permanent injunction against collection of unemployment taxes from churches by the Alabama Department of Industrial Relations. *See Alexander City Baptist Tabernacle, et al. v. Alabama,* No. CV-78-1482-T (Cir. Ct. November 8, 1979). Grace and

ACEA (through its members) also filed an amicus curiae brief in federal appellate proceedings involving similar issues, *See Alabama v. Marshall,* 626 F. 2d 366 (5th Cir. 1980) after having participated as an "interested party" (the approximate equivalent of amicus curiae) in the administrative proceedings that were reviewed therein.

The litigation in the Alabama state court and the Fifth Circuit resulted in decisions favorable to Grace and ACEA. The decision by the Supreme Court of South Dakota and the position asserted by the Respondent herein are to the contrary. Should this Court affirm the ruling of the Supreme Court of South Dakota, the affect will be to overrule or reverse precedents in which applicants have participated on the prevailing side.

The position of applicants involves another argument not yet thoroughly addressed by the parties or the courts in the instant case. Applicants hold that the educational process in their Christian schools *is* the exercise of religion (not merely that the education and religion are closely intertwined). Applicants would show that the educational process is inherently religious and that religious doctrine is being taught, spiritual culture is being instilled and faith is being exercised in every academic course. Applicants' schools are weekday activities of their churches. They are not closely related to the churches. They are the churches.

Finally, the applicants herein hold a firm religious conviction that they cannot pay taxes out of church funds which are designated for expenditure for biblical purposes. They believe that to do so would be a sin. Imposing a tax on the church with respect to its employees would force applicants to choose between obedience to God, whom they dare not disobey and obedience to Caesar.

Should the position of South Dakota and the United States Secretary of Labor be upheld, applicants will be subjected to tax levies, forced sales of church (not school) property and other drastic proceedings which would follow in the wake of their refusal to render unto Caesar a tax from the church treasury. For these reasons, applicants respectfully request that the Court grant permission to file the attached amicus curiae brief.

Respectfully submitted,

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BRIEF OF GRACE BAPTIST TEMPLE, PRATTVILLE, ALABAMA AND THE ALABAMA CHRISTIAN EDUCATION ASSOCIATION, INC. AS AMICI CURIAE IN SUPPORT OF PETITIONERS

PRELIMINARY STATEMENT

Applicants seek to file this amicus curiae brief with the consent of counsel for the Petitioners. Consent was sought from but denied by counsel for the State of South Dakota, Respondent. This brief supports the position of Petitioners. Hereinafter, the designations "J. A." and "P. A." followed by numbers, denote references to pages of the joint appendix and the appendix to the petition for writ of certiorari, respectively.

SUMMARY OF ARGUMENT

The State of South Dakota errs when it interprets 26 U. S. C. § 3309 and South Dakota Compiled Laws Ann.

§ 61-1-10.4 to require unemployment taxation coverage for church-school employees who are in the employ of a church or an organization operated primarily for religious purposes and operated, supervised, controlled or principally supported by a church or convention or association of churches.[1] Such an interpretation is inconsistent with the statutory language of both acts.

If South Dakota's interpretation were correct, it would result in violation of the First Amendment of the United States Constitution, because the State would be hindering the free exercise of religion in an overly burdensome way and in the absence of a compelling interest. It would also violate the establishment clause which prohibits excessive entanglement between church and government and excessive regulatory controls which stifle or inhibit religion.

ARGUMENT

1. Properly interpreted, neither Federal nor South Dakota law require unemployment taxation coverage for persons who are in the employ of a church or an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches.

The language of the pertinent South Dakota statute, S. D. Compiled Laws Ann. § 61-1-10.4 is virtually identical to that of the pertinent Federal statute, 26 U. S. C. § 3309, the Federal Unemployment Tax Act (FUTA).[2] The

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1 Organizations which are "operated primarily for religious purposes and which [are] operated, supervised, controlled or principally supported by a church or convention or association of churches" will hereinafter be called "religious purpose church organizations."

2 The federal law and the state statute will hereinafter sometimes be referred to collectively as "the subject statutes".

former was enacted by South Dakota in order to conform with the latter. The Supreme Court of South Dakota interpreted Section 3309 of FUTA in order to ascertain the proper construction of the corresponding South Dakota statute. *See In re Northwestern Lutheran Academy,* 290 N. W. 2d 845 (S. D. 1980). Therefore, this Court is presented initially with a question of interpretation of 26 U. S. C. § 3309.

(A) The plain language of the subject statutes excludes from coverage employment by persons in the employ of a church or a religious purpose church organization.

It is basic to statutory construction that when the wording of a statute is clear, the meaning ascribed to the statute is the meaning of the words used. *TVA v. Hill,* 437 U. S. 153, 173 (1978). The language of the South Dakota statute provides in SDCL 61-1-10.4 that the term "employment" shall not include services performed:

> (1) in the employ of (a) a church or convention or association of churches, or (b) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches; . . .

This language conforms to Section 3309 of FUTA. Under this language, to determine whether a particular employment is covered, one looks to the nature of the employer. Thus, the question is simply, whether a person is in the employ of a church or a religious purpose church organization. Nowhere does the statute say to look to the duties performed by the employee.

Notwithstanding the statutory language, under the interpretation espoused by South Dakota and the United States Department of Labor (USDOL), we must separate "strictly church duties" from other duties in the

church school. To determine whether a tax is due with respect to particular employees, we are told to examine their duties inasmuch as only the "strictly church duties" are excluded from the tax (JA 42). But this construction ignores the language of the statutes. Nowhere with respect to these exclusions do the statutes say to look to the duties of the employees in determining the tax liability.

Suppose a hypothetical inquiry as to whether coverage exists. Consider a church secretary and a legal secretary. There would be no point in asking about their duties. A church secretary does basically the same things as any other secretary: typing, opening mail, filing, answering the telephone, etc. To inquire about job duties for purposes of the statutes under consideration, is irrelevant. Rather, the important question is "who or what is the employer?" The secretary who is "in the employ of" a lawfirm is covered and unemployment compensation must be paid with respect to his or her salary. The secretary who is "in the employ of a church" is not covered and the tax cannot be required as to his or her salary. Likewise, a teacher in a church-school performs basically the same functions as a teacher in non-church school: They both teach children to read and write, they teach children how to think, how to do mathematical computations, how to behave socially, what morals they should have or what their values should be, the origin and destiny of the human race, etc. The teacher "in the employ of" a private non-religious school or a public school is covered. The teacher in a church-school, who is "in the employ of a church" or "in the employ of" a religious purpose church organization is excluded and the tax cannot be required as to his or her salary.

There can be no doubt that the persons employed in St. Martin Evangelical Lutheran School are "in the employ

of a church". Likewise, it is beyond doubt that persons employed at Northwestern Lutheran Academy are "in the employ of" a religious purpose church organization (P. A. 25, 31-33). The inquiry need go no further. The employees working in both schools are excluded from the tax under the language of the subject statutes.[3]

In reviewing the same statutory language, another court has held that such employees are excluded and that "it is not the responsibility or function of this court to perform linguistic gymnastics in order to upset the plain language of Congress as it exists today". *Alabama v. Marshall,* 626 F. 2d 366 (5th Cir. 1980). In holding otherwise, the Supreme Court of South Dakota has erred.

(B) In the absence of a clear legislative mandate, it is error to construe the subject statutes so as to raise serious constitutional questions.

In a recent case this Court considered the National Labor Relations Board assertion that it could exercise jurisdiction over religious schools. *NLRB v. Catholic Bishop of Chicago,* 440 U. S. 490 (1979). The NLRB had ruled that it had such jurisdiction. The United States Court of Appeals for the Seventh Circuit denied enforcement of the board's orders, ruling that extension of jurisdiction over religious schools by the NLRB would violate the First Amendment of the United States Constitution. *Catholic Bishop of Chicago v. NLRB,* 559 F. 2d 1112 (7th Cir. 1977). Upon review, this Court affirmed the decision of the Seventh Circuit. The Court examined the legislative history of the National Labor Relations Act. It un-

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3 Although there is no need to delve into the legislative history, amici join in arguments made elsewhere and preserved in the record herein to the effect that the legislative history shows no indication of Congressional intent to require coverage for employees of churches or religious purpose church organizations.

dertook that approach because it concluded at 440 U. S. 501 that:

> [I]t is incumbent on us to determine whether the Board's exercise of its jurisdiction here would give rise to serious constitutional questions. If so, we must first identify "the affirmative intention of the Congress clearly expressed" before concluding that the Act grants jurisdiction.

The Court observed that not only could the conclusions of the Board infringe upon the First Amendment rights, "but the very process of inquiry", could do so. The Court further noted that "[t]here is no clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act". 440 U. S. at 504. The Court held then that the National Labor Relations Act must be construed as not permitting the NLRB to exert jurisdiction over religious schools because a contrary construction would give rise to serious constitutional questions.

In the instant case, there is no expression whatsoever, much less a clear expression, that the Congress intended to extend unemployment taxation to employees of churches or religious purpose church organizations whose duties include teaching. In the absence of such an affirmative intention, clearly expressed by Congress, it would be error to conclude that the subject statutes require extension of unemployment taxation to Petitioners.

2. If the South Dakota statute has the meaning asserted for it by the respondent, then it is unconstitutional under the First Amendment of the United States Constitution.

(A) The interpretation contended for by the State of South Dakota hinders and burdens petitioners in the exercise of religion.

In analysis of a First Amendment free exercise question, this Court has set forth the standards to be observed in several previous cases. In *Sherbert v. Verner,* the Court said that the first question is whether the statutory requirement "imposes any burden on the free exercise of . . . religion." *Sherbert v. Verner,* 374 U. S. 398, 403 (1963). The burden on religion need not be direct, but rather, may be indirect. As stated by the Court:

> For if the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate inviduously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.

Sherbert v. Verner, supra at 404.

South Dakota's interpretation of the subject statutes hinders and threatens the observance of Petitioners' (and Amici's) religion in many ways. Most obvious is the financial burden. SDCL § 61-5-15. The law provides that contributions must be paid by the employer and in no respect can they be deducted from the wages of the employee. On this point, the Supreme Court of South Dakota cited *Braunfield v. Brown,* 366 U. S. 599 (1961) for the proposition that a law is not unconstitutional on free exercise grounds merely because it operates "so as to make the practice of . . . religious beliefs more expensive." However, *Braunfield* is inapposite. That case involved Orthodox Jews who contended that application of Sunday closing laws to their businesses was unconstitutional because their faith required that their businesses be closed from Friday evening to Saturday evening. Thus, they asserted that they were put at an unfair disadvantage. Because their faith required that they close on Saturday, when most establishments were open, they argued that they should be able to stay open on Sunday when most

establishments were closed. It was in that context that the Court observed that a statute will not be stricken on free exercise grounds merely because it makes the practice of religious beliefs more expensive. The Orthodox Jews were not forced to work on a day upon which their faith required rest. Nor were they required to rest on a day upon which their faith required work. Rather, they were not allowed by the law to work on a day on which their faith *allowed* them to work. There was no direct financial burden imposed. No tax was imposed upon them for working on Sunday, or for not working on Saturday. No direct financial outlay was forced upon them. Rather, because of their *faith,* they did not work on Saturday—a day when the law would have allowed them to work. But the law did not infringe directly on their faith by prohibiting work on Sunday. Thus, the rationale of *Braunfield v. Brown, supra,* is inapposite to the instant case where Petitioners are purportedly subjected to a direct financial burden in the form of a tax upon their religious activity, the operation of a religious school.

The subject statutes impose other burdens. For instance, an employee can be disqualified for benefits if he left his work "voluntarily without good cause" under SDCL § 61-6-13 or if he were discharged for "misconduct connected with his work" under SDCL § 61-6-14. When there is reason to believe that an employee is disqualified for benefits, the former employer is made a party to the department's proceeding (in obvious recognition of the fact that the former employer has a stake, i. e., something to lose). SDCL § 61-7-3. An employer's account is charged when his former employees receive benefits and this can result in an increased liability to the employer. *See* SDCL §§ 61-5-17, 61-5-18, 61-5-28, 61-5-29 and 61-7-3. Thus, in a

particular case it might well be to the employer's (i. e., church's or synod's) interest to show that an employee voluntarily left his job "without good cause" or that the employee was terminated "for misconduct". In such instances the interests of the employer and the employee would be adverse and the government would be put in the role of determining who was correct.

Here the mission or purpose for the church school becomes relevant. At St. Martin Evangelical Lutheran School, not unlike the typical church school, the education process is regarded by the Church and its members as religious. It necessarily deals with questions which are ultimately religious in tone. It is impossible to have complete education without dealing with God in some way. Hence, the "academic" subjects are taught from a Christian perspective. It is believed that the Bible requires a Christian education, i. e., a biblical education in which children are trained "in the nurture and admonition of the Lord." This requirement stems from the Bible and is a part of the faith of the church and the families involved in church-schools. In sending their children to church-schools, the parents and church staff are not performing a "secular" function. In sending their children to church-schools, the parents and church staff are practicing their faith.

The church school activities are supported financially by the church. They are staffed by church staff. They are governed by the church governing bodies. They receive no government aid. Prayer, scripture and Bible study have a place in every subject or activity. In every respect the school is an integral part or facet of the church and not a separate undertaking or enterprise. For the state of South Dakota to say to such a church "persons employed in your school are now subject to unemployment

taxation" is the equivalent of saying to it "persons employed in your Sunday School are now subject to unemployment taxation".

Similarly, the Northwestern Lutheran Academy is established out of religious motivation, the training of pastors. The scope of the undertaking in the Academy is not less "religious" than in St. Martin Evangelical Lutheran School.

It is readily apparent that the church school or the pastoral training academy are not established merely to impart academic knowledge. They are designed to indoctrinate the students in a set of values which are to govern the students throughout their lives. In this context, it is obvious that the church staff (i. e., the teachers) must uphold consistent standards at all times, even when "off duty", if credibility is to be maintained.

Here is where infringement will surely occur. There will be instances where "off duty" conduct by an employee would be sufficient cause to terminate him from church employment, because of the *religious* duty to be exemplary in inculcating Christian values. Often such conduct would not be labelled "misconduct" by persons of different beliefs. This will cause situations where the Secretary will be second guessing the church's religious authority over its employees. For instance, suppose an employee is terminated because it is learned that he is unmarried, but living with a member of the opposite sex. Or suppose an employee is terminated because he is seen, off duty, drinking beer. The former is acceptable to a large segment of society, the latter to most of society. Either of these might be cause to fire him from a Christian school. Yet the Secretary would be forced to decide whether the employee was discharged "for misconduct connected with his work."

The possibilities of conflict are manifest. Is such activity "misconduct"? Is it "connected with work" if it occurs on Friday evening? Is it "connected with work" if no student observes it? Is it "misconduct" if done without knowledge of a specific rule prohibiting it? If done "in good faith"? If the church's goal in having its Christian school is to instill basic religious morals, attitudes and lifestyles, may the church, in the interest of consistency and credibility impose requirements of round the clock conformity to its standards?

Upon every occasion of employee misconduct the church would face the prospect of having its decision reviewed. If the employee prevails, the church faces increased tax liability. This would chill the decision making process in the church or synod. Their choice would be: to act on their beliefs, terminating the employee for unseemly conduct and thereby facing increased taxes or the possibility of a hearing where their decision is second guessed, or in the alternative, to give up their beliefs and allow the disobedient employee to remain on the staff.

Similarily, the Secretary will necessarily have to determine the credibility of church or synod officials, not only as to whether a doctrinal position asserted is the actual reason for firing the employee, but whether the doctrinal interpretation asserted is really the correct doctrinal position of the church or synod. The situation here is similar to that in the *Catholic Bishop of Chicago v. NLRB*, 559 F. 2d 1112 (7th Cir. 1977) at 1125:

> We are unable to see how the Board can avoid becoming entangled in doctrinal matters if, for example, an unfair labor practice charge followed the dismissal of a teacher either for teaching a doctrine that has current favor with the public at large but is totally at odds with the tenets of the Roman Catholic faith, or for adopting a lifestyle acceptable to some, but con-

> trary to Catholic moral teachings. The Board in processing an unfair labor practice charge would necessarily have to concern itself with whether the real cause for discharge was that stated or whether this was merely a pretextual reason given to cover a discharge actually directed at union activity. The scope of this examination would necessarily include the validity as part of church doctrine of the reason given for discharge.

Likewise, where an employee is dismissed, say, for drinking wine, the inquiry might focus not only on whether the "misconduct" was the basis for the discharge but also on whether the teaching that drinking wine is "misconduct" is properly part of the moral teachings or doctrine of the church.

The subject statutes as interpreted by the United States Department of Labor and South Dakota impede or threaten the observance of the faith of operators of church schools in another way. It is clear under the statute that employment "in the employ of a church" is excluded from taxation. Therefore, to rule that teachers in the church schools are not excluded, while the church janitor, for instance, is exempt, is to rule that the teachers are not in the employ of the church. In effect, Caesar is asserting what *is* the church and what *is not*. Obviously as to churches, only ecclesiastical authority (i. e., only God through His Word, the Holy Bible, for Amici) can define what their church activities should be and should not be.

In this respect, Biblical mandates requiring an education of children are, for instance: Deuteronomy 6:6-7; Ephesians 6:4; Isaiah 54:13; Proverbs 1:7; Psalms 101:3; Psalms 78; Jeremiah 10:2; Proverbs 22:6; Proverbs 19: 27-28 and many others. The rearing and educating of children has been a responsibility imposed by the Christian faith and its Jewish predecessor in the Old Testament

days, for more than 5,000 years. For civil government now to say that in establishing Christian schools and paying teachers to work therein, the churches are not practicing their faith, or the schools are not part of the church, is to violently destroy the traditional and biblical definition of the church.

To impose the unemployment tax upon the church likewise violates the scriptural principle that the churches are not to pay taxes to civil government. The money in the church treasuries is regarded as God's money, held in trust, for uses consistent with His Word. To give God's money to civil government would be to violate the command of Jesus Christ, to "render therefore unto Caesar the things which be Caesar's, and unto God the things which be God's" (Luke 20:25). This the churches cannot do, regardless of the consequences, because of the biblical requirement that they obey God rather than men, when the law of man conflicts with the law of God (Acts 5:29). Imposition of the tax upon the churches, therefore, places them in the unenviable position of being told by government that they must do something that violates their sacred faith. In order to obey the subject statutes as interpreted by South Dakota it is the sincerely held beliefs of the Amici that they will have to violate God's Word. That alternative is not open to them. They will have no choice but to disobey the unbiblical requirement imposed by government.

Finally, in addition to the burdens described above, there will be the indirect financial burdens in the form of administrative and record keeping costs and the need to respond to state inquiries, state subpoenas to appear at hearings and so forth. SDCL §§ 61-3-2, 61-3-3, 61-3-7, and 61-7-1. Clearly South Dakota's interpretation of the subject statutes will result in burdens upon the free exercise of religion.

(B) The State has no compelling interest in imposing the statute as interpreted by South Dakota and the United States Department of Labor.

The constitutional rule, as stated by this Court in *Sherbert v. Verner,* 374 U. S. 398, 403 (1963), is that if the State places even an "incidental" burden on the freedom of religion, then such State action is in jeopardy of being stricken for violating religious liberty. In determining when state action is to be upheld in the face of a free exercise claim, the Court stated (at 403):

> "[I]t must be because [it] represents *no* infringement by the State of [the] constitutional rights of free exercise, or because any incidental burden on the free exercise of [Plaintiff's] religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . .' *NAACP v. Button,* 371 U. S. 415, 438." (Emphasis added.)

The application of the unemployment tax laws, as discussed above, imposes more than incidental burdens on Petitioners. Therefore, the rule enunciated in *Sherbert v. Verner, supra,* must be applied, i. e., the statute may be justified only if the State of South Dakota has a *compelling* interest in imposing the statutory requirements.

The "compelling interest" standard is not to be taken lightly. Rather, as proclaimed by this Court in *Wisconsin v. Yoder,* 406 U. S. 205 (1972) (at 215):

> The essence of all that has been said and written on the subject is that only those interests of the *highest* order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. (emphasis added).

This was a reiteration of the *Sherbert v. Verner* standard which was phrased as follows in that case (at 406):

> It is basic that no showing merely of a rational relationship to some colorable state interest would

> suffice; in this highly sensitive constitutional area, [o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.

South Dakota has no compelling state interest in imposing SDCL § 61-1-10.4 upon churches or the pastoral training academy operated by the synod. The apparent purpose of the statute is to protect employees from financial disaster when they lose their jobs. However, one exclusion from coverage is persons "in the employ of a church". If the state of South Dakota has no compelling interest in imposing unemployment compensation coverage for persons who are employed by churches as janitors or secretaries, why does the state have a compelling interest in imposing such coverage for persons who are church teachers?

Moreover, the very nature of the jobs held in Petitioner's schools show that they are not appropriate subjects of coverage. The "employees' are not mere job holders. Rather, these persons are "called" to their positions. The jobs are regarded by the churches, and the teachers themselves, as ministries or missions. The teachers are serving God in their occupations (P. A. 37-38). These persons are not different in their dedication from pastors or ministers of the church. For government to "protect" them in the event of unemployment is to entangle itself with the church and to intrude upon their religious beliefs.

Finally, should these teachers become unemployed, there are other forms of protection available to them.[4]

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4 Welfare and aid to families with dependent children are two examples, although many adherants of the fundamentalist faith would reject any form of government assistance, but would rather look to the church for charitable provision when needed.

The government is seeking to impose its power, where it is not wanted or needed. That it is neither wanted nor needed shows that the intrusion is interference with the free exercise of religion, and that the government has no compelling interest for doing so.

(C) The State must show that there are no other less intrusive ways of accomplishing any interest which it might have.

Language quoted above from *Wisconsin v. Yoder, supra* (at 215) bears repeating:

> The essence of all that has been said and written on the subject is that only those interests of the highest order and *those not otherwise served* can overbalance legitimate claims to the free exercise of religion. (emphasis added).

The italicized words point out another aspect of the compelling state interest test. First, where a government regulation interferes with religion, the government must show that it has a compelling state interest. Secondly, assuming that it can make such a showing, the government must show that its interest cannot be served, that its objectives cannot be accomplished, in any other manner that is less burdensome upon the free exercise of religion.

This requirement was imposed by this Court in earlier cases, including *Sherbert v. Verner, supra. Sherbert v. Verner* dealt with a Seventh Day Adventist who was unable to collect unemployment compensation benefits under the statutory scheme of South Carolina. Because she refused to work on Saturdays, the state commissioner had found that she was unavailable for work and disqualified for benefits according to that state's statute. The Court first noted that this ruling caused her to choose between observing the requirement of worship and rest on Saturday and thereby forfeiting benefits on the one hand, or

abandoning the precepts of her religion in order to accept work on the other hand. This requirement, the Court held, violated the free exercise of her religion. The Court then looked for some showing of a compelling state interest. The State offered the prospect of the filing of spurious claims, by persons who claimed falsely to be Sabbatarians. The Court, in dealing with this argument, noted that it is the burden of the state to show that there is no less burdensome means of serving its interest. It is not the burden of the free exercise claimant to prove that there is some less burdensome means available. Thus, the Court stated in *Sherbert v. Verner* (at 407):

> "For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees [the state] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."

Though it is certainly not a "compelling" interest, whatever interest the state has in imposing unemployment coverage on church employees can be served by other means which are less burdensome. While Amici are not required to make any such showing, nevertheless, one less burdensome alternative will be mentioned.

A program providing for unemployment compensation for church employees, including school teachers, could be voluntary. Employers in other realms often participate voluntarily in insurance programs or benefit programs where their employees want it. Thus, if participation by church employers in a program of unemployment compensation were voluntary, whereby churches could choose to participate or not participate, those whose convictions are not violated by such a program, and who desire to do so, could participate. Those such as Petition-

ers or Amici whose religious convictions would be violated by the program could choose to stay out of it. Prospective employees in church schools who do not share the convictions of the Petitioners or Amici could seek employment at churches where such benefits are available. Under this alternative churches which have a deeply held religious conviction that they cannot participate in such a program would not be forced to do so, yet there would be such program benefits available for those who want them.

(D) South Dakota's interpretation of the subject statutes would also result in a violation of the establishment clause of the First Amendment of the United States Constitution.

There are two basic aspects to establishment clause limitations on government. One concerns whether, as a result of the statutory interpretation, government will become excessively entangled in affairs of the church. This was explained in *Lemon v. Kurtzman*, 403 U. S. 602 (1971). That case concerned statutes from Pennsylvania and Rhode Island which authorized financial aid to parochial schools. The Court, in holding the statutes unconstitutional observed, at 612-613:

> The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be "no law *respecting* an establishment of religion." A law may be one "respecting" the forbidden objective while falling short of its total realization. A law "respecting" the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not *establish* a state religion but neverthe-

less be one "respecting" that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.

In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Commission,* 397 U. S. 664, 668, 25 L. Ed. 2d 697, 701, 90 S. Ct. 1409 (1970).

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen,* 392 U. S. 236, 243, 20 L. Ed. 2d 1060, 1065, 88 S. Ct. 1923 (1968); finally, the statute must not foster "an excessive government entanglement with religion." *Walz, supra* at 674, 25 L. Ed. 2d at 704. (Emphasis added.)

The continuous contact between the church and state as outlined in another portion of this brief will constitute excessive entanglement. Not only will there be frequent contact, inspections of records, response to subpoenas and attendance at hearings, but there is the very real probability that the state Secretary of Labor will be required to interpret church doctrine in the face of conflicting testimony. He will be called upon to pass on the validity and credibility of testimony of church officials in deciding doctrinal questions as related to "misconduct" or quitting for a "good cause". He may be called upon to examine the day to day classroom activities of a teacher to ascertain what portions of his or her time is devoted to religious and non-religious pursuits respectively. SDCL § 61-1-31. Moreover, each church will have an "account"

with the state whereby its performance in hiring and firing employees will be subject to continuous consequences in terms of increased liability for unemployment tax payments. This is excessive entanglement in a free society where church and state are supposed to be separated by a wall of protection.

Many of the recent court decisions have focused on the entanglement question. In *Grace Lutheran Church v. North Dakota Employment Security Bureau,* 294 N. W. 2d 767 (N. D. 1980) the court first held that under the statutory language, no coverage could be imposed upon school teachers who taught in Grace Lutheran Church's school. The court went on to discuss the constitutional issues. It noted, at p. 773, that the United States Department of Labor had advised all state agencies that as to an employee who performs both non-exempt and exempt services during an employment period, if more than one-half of his services were non-exempt, then all of his services would be treated as non-exempt for unemployment taxation purposes. The converse was also true, i. e., if more than one-half of the employee's services were exempt, then all of his services would be treated as exempt for unemployment tax purposes. As the Supreme Court of North Dakota observed, at 774, this would put the state agency to the task of conducting "extensive audits in order to determine whether or not the employee has spent more than one-half of his time on purely religious activity." The Court concluded that such inspection and inquiry by the state would also require extensive records and would constitute "pervasive monitoring of these church agencies by the secular authorities". *Grace Lutheran Church v. North Dakota Employment Security Bureau, supra,* at 774. A similar observation was made by the Court in *Grace Breth-*

ren Church v. California, No. 79-93 MRP (D. C. Cal. Sept. 21, 1979) (granting preliminary injunction) wherein the Court observed that "controversies will arise, for example, as to whether in a world history class the teacher spends more than one-half of any given session teaching purely "religious" or purely "secular" history. . . ."

Both the Supreme Court of North Dakota and the Federal District Court for the Central District of California were also concerned that decisions to fire or lay off employees would be reviewed by state authorities. As noted in *Grace Lutheran Church v. North Dakota Employment Security Bureau, supra* at 774:

> Thus, disputes may arise where the church dismisses an employee for failure to teach according to the religious tenet of the church. The employee may contend that the real reason he or she was dismissed was due to budgetary concerns. In such event, the state agency would have to determine whether or not the teacher did, in fact, fail to adhere to the religious tenets of the church. This is the type of entanglement prohibited by the First Amendment to the Constitution.

Amici would point out that regardless of the outcome, "the very process of such inquiry" has a chilling effect and is the type of hindrance which also violates the free exercise clause. *NLRB v. Catholic Bishop of Chicago,* 440 U. S. 490, 502 (1979).

Furthermore, as alluded to before, the statute here states that a "church" employee is exempt. For the state to impose the tax upon church school employees is to assert that the church school is not church or that the purpose of the synod's pastoral training academy is not "religious". In so doing, the State is defining the church. It is saying what is religious and what is not religious. This violates the establishment clause because the State

purports to be excluding from the definition of the term "religious" certain activities which have historically been considered religious within the Judeo-Christian culture. It is thereby approving or establishing religions which adhere to the state concept and which depart from deeply rooted religious tenets.

Finally, *Walz v. Tax Commission,* 397 U. S. 664 (1969) must be considered. There a taxpayer brought suit to enjoin the New York City Tax Commission from granting property tax exemptions to religions organizations. The Court, in examining the concept of a tax exemption noted, at 676, that it "creates only a minimal and remote involvement between church and state and far less than taxation of churches." In *Walz* the court further observed, at 674:

> Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes.

The prospect of church state confrontations over non-payment of taxes is a forbidding presence in this case. Amici churches are involved in this matter only because their religious convictions *require* that they not pay taxes to Caesar. The church's money is dedicated to uses permitted or required in the Bible. It is regarded as God's money. The churches recognize the concept, espoused by this Court in *McCulloch v. Maryland,* 17 U. S. 316 (1819) "that the power to tax involves the power to destroy". If South Dakota can tax the churches or synods in this state, it can destroy them, and this will most surely occur where the state seeks to impose taxes upon churches which, in obedience to God, resist. The logical consequence will be that which was described in *Walz v. Tax Commission,*

that is, tax liens, foreclosures, and sales of church property upon the courthouse steps. The result will be ominous. It will be the fearful concept of state officers selling church property, shutting down the church, and stopping the free exercise of religion first in South Dakota, then all of the United States of America.

CONCLUSION

The conclusion is inescapable that (1) 26 U. S. C. § 3309 and SDCL § 61-1-10.4 not require St. Martin Evangelical Lutheran Church or the Wisconsin Evangelical Lutheran Synod to contribute to the Unemployment Tax fund for coverage for church or synod employees, i. e., persons employed in the church school or persons employed in religious purpose church organization; (2) if the statutes are so interpreted, they will be in violation of the free exercise clause of the first amendment and the establishment clause of the first amendment. Amici churches respectfully submit that this Court should rule that under the subject statutes persons who are "in the employ of a church" or in the employ of a religious purpose church organization be they employed as teachers in a Christian school, pastors, church secretaries, or in any other capacity, are exempt from the requirement that unemployment coverage be provided for them. This case should be remanded to the Supreme Court of South Dakota whose decision should be reversed, with instructions to proceed accordingly.

Respectfully submitted,
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by.....

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Motion of Grace Baptist Temple, Prattville, Alabama and the Alabama Christian Education Association, Inc. for Leave to File Brief as Amici Curiae and Brief of Grace Baptist Temple, Prattville, Alabama and the Alabama Christian Education Association, Inc. as Amici Curiae in Support of Petitioners were served by depositing them in a United States post office or mailbox, with first-class postage prepaid, this 15th day of December, 1980, addressed to Edward Thomas Schilling, Esq., 757 North Broadway, Suite 500, Milwaukee, Wisconsin 53202, counsel for Petitioners and Judith A. Atkinson, Esq., Assistant Attorney General, Office of Attorney General, State Capitol, Pierre, South Dakota 57501, counsel for Respondent.

.....

David C. Gibbs, Jr.

MOTION FILED

DEC 19 1980

No. 80-120

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH, *et al.*,
Petitioners,

v.

STATE OF SOUTH DAKOTA,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE LUTHERAN CHURCH-MISSOURI SYNOD AS AMICUS CURIAE IN SUPPORT OF ST. MARTIN EVANGELICAL LUTHERAN CHURCH, *et al.*

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QUESTIONS PRESENTED

The Lutheran Church-Missouri Synod agrees with the questions presented as set forth in the brief filed on behalf of St. Martin Evangelical Lutheran Church *et al,* and incorporates the same by this reference.

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Motion For Leave To File Brief Of The Lutheran Church-Missouri Synod As *Amicus Curiae* In Support Of St. Martin Evangelical Lutheran Church *et al.*

The Lutheran Church-Missouri Synod respectfully moves the Court, pursuant to Rules 36 and 42 of its Rules, for leave to file the accompanying brief, *amicus curiae,* in support of St. Martin Evangelical Lutheran Church *et al* in the captioned matter.

The Lutheran Church-Missouri Synod is the second largest Lutheran denomination in North America and the fifth largest Protestant body in the United States. It has approximately 6,200 member congregations which, in turn, have approximately 2,800,000 individual members. The congregations of the Synod operate approximately 1,400 elementary and secondary schools situated in most of the states of the United States.

The Lutheran Church-Missouri Synod has been at the forefront of efforts to challege the Secretary of Labor's interpretation of section 3309(b)(1)(A) of FUTA through administrative and judicial means. Its experiences in those efforts result in it being one of a relatively few national church bodies that are uniquely qualified to present to this Court the vital issues that are presented in this case. The issues presented in this case touch upon the core of religious liberty and the fundamental interests of the Synod and its congregations.

Therefore, The Lutheran Church-Missouri Synod strongly supports the position taken by St. Martin Evangelical Lutheran Church *et al* and respectfully requests that the Court accept the accompanying brief.

Consent To The Filing Of The Attached Brief *Amicus Curiae* Has Been Requested Of The Parties And, Although Granted By St. Martin Evangelical Lutheran Church *et al*, The Said Consent Has Been Refused By Respondent State Of South Dakota.

The consent of the parties to the filing of the attached brief has been sought by The Lutheran Church-Missouri Synod. Such a consent has been obtained from St. Martin Evangelical Lutheran Church and is appended to this motion. However, respondent State of South Dakota refused such consent. The Lutheran Church-Missouri Synod, accordingly, has proceeded by this motion.

December, 1980

Respectfully submitted,

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Re: St. Martin Evangelical Lutheran Church
and Northwestern Lutheran Academy,
Petitioners,

v. The State of South Dakota

Case No. 80-120

Gentlemen:

The undersigned, as counsel of record for the petitioners in the above matter, hereby consents to your filing of a brief amicus curiae pursuant to Rule 36.2 Rules of the Supreme Court of the United States.

Edward Thomas Schilling

Edward Thomas Schilling
Counsel for Petitioners

No. 80-120

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH, *et al.*,
Petitioners,

v.

STATE OF SOUTH DAKOTA,
Respondent.

BRIEF AMICUS CURIAE OF THE LUTHERAN CHURCH-MISSOURI SYNOD IN SUPPORT OF ST. MARTIN EVANGELICAL LUTHERAN CHURCH, *et al.*

INTRODUCTION

This brief is respectfully submitted by The Lutheran Church-Missouri Synod. The Lutheran Church-Missouri Synod is a denomination whose member congregations operate more elementary schools in the United States than any other Protestant denomination and, as such, has been in the forefront of the efforts to challenge the Secretary of Labor's interpretation of the provision of the law at issue in this case.

The Lutheran Church-Missouri Synod is the second largest Lutheran denomination in North America and the fifth largest Protestant body in the United States. It has approximately 6,200

member congregations which, in turn, have approximately 2,800,000 individual members. The congregations of the Synod operate approximately 1,400 elementary and secondary schools situated in most of the states of the United States.

The Lutheran Church-Missouri Synod has been at the forefront of efforts to challenge the Secretary of Labor's interpretation of section 3309(b)(1)(A) of FUTA through administrative and judicial means. Its experiences in those efforts result in it being one of a relatively few national church bodies that are uniquely qualified to present to this Court the vital issues that are presented in this case. The issues presented in this case touch upon the core of religious liberty and the fundamental interests of the Synod and its congregations.

STATEMENT OF THE CASE

The Lutheran Church-Missouri Synod accepts the statement of the case as set forth in the brief filed on behalf of St. Martin Evangelical Lutheran Church *et al,* and incorporates the same herein by this reference.

SUMMARY OF THE ARGUMENT

The Synod hereby adopts the brief filed for Petitioners St. Martin Evangelical Lutheran Church *et al.,* in its entirety, and incorporates it herein by this reference. However, the Synod will make two supplemental points and one additional point.

The Synod will herein supplement the Petitioners' arguments on the issues presented by making the following points:

1. There is no indication that Congress has ever intended the phrase "church or convention or association of churches" as used in Section 3309(b)(1) to mean something vastly different than what it means under each of the other sections of the Internal Revenue Code in which it is used.

2. The Secretary's interpretation of Section 3309(b)(1) must be rejected because the very notion of applying an exemption dealing with structure ("church or convention or association of churches") on the basis of an activities test ("strictly church duties performed . . . pursuant to . . . religious responsibilities") is repugnant to both religion clauses of the First Amendment, and, if allowed, will have far reaching adverse consequences to religious freedom on many issues beyond the one here immediately involved.

ARGUMENT

The Synod supplements the Petitioners' Argument as follows:

1. The phrase, "a church or a convention or association of churches," is used in Sections 170(b)(1)(A)(i), 410(d), 414(e)(1)(A), 414(e)(3)(A), 512(b)(14), 514(b)(3)(E), 3309(b)(1) and 7605(c) of the Internal Revenue Code of 1954 (the "Code"). *See* 26 U.S.C., cited sections. The phrase, "churches, their integrated auxiliaries, and conventions or associations of churches" is used in Sections 508(c)(1)(A), 6033(a)(2)(A)(i) and 6043(b)(1) of the Code. *See* 26 U.S.C., cited sections. The Secretary would like to believe that because Section 3309(b)(1) is an exemption from a program which is "social legislation," it ought to be construed more narrowly than is the case when identical or essentially identical words are used in other provisions of the Code.[1] There is no support for such a distinction. There is no indication that Congress has ever intended that, when it used the phrase "church or convention or association of churches" in Section 3309(b)(1), it meant something vastly different than what it meant in using the phrase in the other cited sections of the law.

There is support for understanding the phrase, "church or convention or association of churches," not as buildings, but as organizations, including congregations, parishes, temples and synagogues, and also including those organizations which are often referred to as church "denominations":

a) In an early version of the bill which became the Internal Revenue Code of 1954, Section 170 used the words "a church or a convention or association of churches, *or a religious order.*" (Emphasis added.) In testimony before the Senate Finance

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[1]Decision of the Secretary of Labor holding the States of Alabama and Nevada to not be in conformity with FUTA, at 7 (1979.)

Committee,[2] it was stated that to separately classify religious orders would indicate that they were not within the meaning of the term "church", contrary to facts and church law. When the Senate Finance Committee issued its report on the bill, deleting the words "or a religious order," it showed that it intended a broad construction, based on structure, when it stated:

> "Your committee understands that 'church' to some denominations includes religious orders *as well as other organizations which, as integral parts of the church are engaged in carrying out the functions of the church whether as separate corporations or otherwise.* It is believed that the term 'church' should be all inclusive. To retain the phrase 'or a religious order' in this section of the bill will tend to limit the term and may lead to confusion in the interpretation of other provisions of the bill relating to a church, a convention or association of churches. Accordingly, your committee believes that this section of the bill will be clarified by this section of the bill." (Emphasis added.)[3]

b) Even earlier, in 1950, when the predecessor section to present Section 511 was being considered, the bill provided an exemption to "churches" from the tax on unrelated business taxable income. During the hearings conducted by the Senate Finance Committee on H.R. 8920, it was pointed out:

> "The exemption of a 'church' does not protect these independent churches [Baptist churches and other churches having a similar structure] in their cooperative religious activities as it does the churches of other faiths integrated into

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[2]See Hearings on H.R. 8300 before the Senate Finance Committee. 83rd Cong., 2nd Sess. 1028 (1954).

[3] See S. Rep. No. 1622, 83rd Cong., 2nd Sess. 30 (1954).

an organic church having over-all ecclesiastical authority, and being itself autonomous."[4]

As a result of this testimony, the Senate amended Section 301(b)(1) of H.R. 8920 so that it used the words "church, convention or association of churches." The House agreed to this amendment in conference, and the amendment was ultimately incorporated into law as Section 421(a)(1)(A) of the Internal Revenue Code of 1939. This language was recodified, without change, as Section 511(a)(2)(A) of the Internal Revenue Code of 1954. The exemption in that Section has since been revoked, except to the extent set forth in Section 512(b)(14).

It is apparent from the foregoing legislative history that the phrase was intended to provide an exemption to churches in whatever form they might be organized, focusing on the structure through which religious activities are carried out, without dissecting that structure according to each of its activities.

c) As late as 1974, Congress enacted Section 410(d) and 414(e)(1)(A) of the Code, using the phrase, "church or convention or association of churches." These provisions deal with certain church plans under the Employees Retirement Income Security Act, which also must be seen as "social legislation." There is no indication in the legislative history that Congress then foresaw dissecting a church body in the way being proposed by the Secretary of Labor. Indeed, the Treasury Department, in its proposed regulations to Section 414(e)(1)(A),[5] apparently

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[4] Hearings before the Senate Finance Committee, 81st Congress, 2d Session, on H.R. 8920, p. 216; language in brackets supplied.

[5] "For the purpose of this section the term "church" includes a religious order or a religious organization if such an order or organization (1) is an integral part of a church, and (2) is engaged in carrying out the functions of a church, *whether as a civil law corporation or otherwise.*" (Emphasis added.) Proposed Reg. 1.414(e)-1(e), CFR 4/8/77.

believes that Congress anticipated that the phrase extends to other organizations, even those separately incorporated, that are related to a church or convention or association of churches and involved in functions of the church.

d) Even Section 6033, which uses the phrase, "churches, integrated auxiliaries and conventions or associations of churches," gives no support for dissecting a body which itself is beyond any doubt a church or a convention or association of churches. These provisions provide exemptions from filing Form 990, an annual report form. Notwithstanding that the Internal Revenue Service, as the regulatory body involved, is inclined to want the exemption construed narrowly, it has never suggested that an organization will be dissected, activity by activity, in determining whether Form 990 is to be filed or not. Indeed the Regulation impliedly concedes that an elementary school which does not have a legal existence separate from the church which operates it is not required to file Form 990 and expressly concedes that another activity, an orphanage, not having a separate legal identity from the church operating it is part of that church for purposes of applying the law.[6]

2. A law regulating or otherwise affecting activities undertaken in the exercise of religion should be required to be precise and unambiguous. When an exemption is afforded, to those engaged in religious activities, from a law regulating or otherwise affecting persons or organizations generally, the exemption

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[6] "School B, an elementary grade school . . . is affiliated . . . with a church . . . . School B *has a separate legal identity from that of the church* . . . . B is not an integrated auxiliary of a church . . . ." (Emphasis added.) See Reg. 1.6033-2(g)(5)(c)(iv), Example 2. "Orphanage F . . . does not have a legal identity separate from that of the Church which operates it.1 . . . The exception from filing a return under Section 6033 accorded to the church of which Orphanage F is a part also applies to Orphanage F itself, "Example 3". Fed. Reg. 1/4/77, pages 777-768.

should also be precise and unambiguous. Furthermore, as this Court held in *NLRB* v. *Catholic Bishop,* 440 U.S. 490 (1979), absent a clear showing that Congress so intended, the law will not be interpreted in a way in which difficult and sensitive First Amendment issues are created. The exemption in Section 3309(b)(1)(A), if given its plain meaning, will not create those issues. It provides an exemption from coverage as to those who perform services in the employ of acertain kind of organization, using words which describe the employing organization according to its structure as a "church or convention or association of churches".

Notwithstanding this precise and unambiguous test which does not risk violation of rights protected by the Constitution, the Secretary has introduced imprecision and ambiguity by an interpretation of Section 3309(b)(1)(A) which is based upon an activities test. The Secretary proposes the exemption be available only as to those employees who are engaged in *strictly* (whatever that means) *church duties* (whatever those are) *performed . . . pursuant to . . . religious responsibilities* (whatever those are).[7]

It certainly cannot be asserted that no elementary or secondary school operated by a church or a convention or association of churches is a religious activity. On the other hand, unless each organization is permitted to conclusively define its own "strictly church duties" and "religious responsibilities," the test itself will necessitate the Department of Labor (or, under its coercion, the state governments), and ultimately the courts, to first inquire into beliefs and practices of each church organization, then to judge whether the schools are part of the exercise of religion of that church organization, and finally to maintain

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[7] Letter from Secretary of Labor Ray Marshall to the Most Reverend Thomas C. Kelly, General Secretary, United States Catholic Conference (Apr. 18, 1978).

continued surveillance of the church organization to determine whether its schools, under its beliefs and practices, continue to be a part of its exercise of religion. All of this would, of course, unduly interfere with free exercise of religion and excessively entangle the government in the church's affairs.

Furthermore, if the government, operating under the Secretary's scheme, actually found that the schools of some church organizations are within the exercise of religion (as many groups have consistently declared, in some cases for centuries), but that the schools of other church organizations were not within the exercise of religion, there would be a clear-cut case of classic "establishment" as forbidden by the First Amendment.

The point which the Synod is here making is that the very establishment of the activities test proposed by the Secretary is itself, as a threshold matter, a violation of the First Amendment religion clauses as to any organization to which the government might even begin to apply the test. Consequently the test must be struck down by this Court.

CONCLUSION

The Secretary's interpretative scheme is a blatant "end-run" on the First Amendment. It is an end-run in that it really stands for the proposition that operating elementary and secondary education programs in lieu of compulsory public education is not a religious function of a church, and so such activities are not even entitled to the protections afforded by the religion clauses of the First Amendment. If the Secretary's interpretation is allowed to stand, then there is no need to weigh and balance public interests to determine whether interference with free exercise of religion in the church's schools is "undue": the Secretary would simply assert that there is no religion being exercised. If the Secretary's interpretation is allowed to stand, then there is no need to evaluate the quantity of entanglement of

government with the churches which operate the schools to determine whether it is "excessive": the Secretary would assert that there is no religion with which government would be entangled.

The Synod asks this Court to reject the Secretary's interpretation of the exemptions under section 3309(b)(1) of Federal Unemployment Tax Act.

December, 1980

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No. 80-120

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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STATE OF SOUTH DAKOTA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTIONS PRESENTED

1. Whether the Federal Unemployment Tax Act requires participating state unemployment compensation programs to cover employees of parochial elementary and secondary schools.

2. Whether coverage of employees of parochial elementary and secondary schools in an unemployment compensation program violates the First Amendment.

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INTEREST OF THE UNITED STATES

The Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. 3301 *et seq.*, and related federal laws authorize grants of federal funds to qualifying states for the administration of state unemployment compensation and employment service programs and provide federal tax credits for employers operating within such states. Because of the federal government's responsibility to administer FUTA, and particularly the Secretary of Labor's responsibility to certify as qualified for these benefits only those states whose statutes conform to federal requirements, the United States has an important interest in this case.

STATEMENT

The issue in this case concerns the proper interpretation of the Federal Unemployment Tax Act ("FUTA"), 26 U.S.C. 3301 *et seq.*, and its implementation through the South Dakota Unemployment Insurance Law, Title 61 of the South Dakota Codified Laws Ann. (1978). Prior to 1976, FUTA permitted qualifying states to exempt from their programs certain types of employment by non-profit institutions, including services performed:

> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;
>
> (2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;
>
> (3) in the employ of a school which is not an institution of higher education.

26 U.S.C. (1970 ed.) 3309(b). The South Dakota unemployment compensation law contained the same exemptions in almost identical language. In 1976, Congress, in amending FUTA, repealed the third exemption relating to elementary and secondary schools. Thereafter, South

Dakota amended its own statute to eliminate the third exemption. 1977 S.D. Sess. Laws, ch. 420, § 10; see S.D. Codified Laws Ann. § 61-1-10.4(3) (1978).

The Secretary of Labor has interpreted the 1976 amendments to FUTA as requiring that the statutes of qualifying states cover parochial school employees.[1] In May 1978, the South Dakota Department of Labor notified petitioners that employees of their schools are covered under the state unemployment compensation program. Petitioners challenged this determination. After an administrative appeal, and review by an intermediate appellate court, the South Dakota Supreme Court upheld this determination (Pet. App. A-1 to A-24). The court concluded that Congress intended to eliminate the exemption for parochial school employees when it amended FUTA in 1976 (*id.* at A-5 to A-9). Accordingly, it held that petitioners' school employees, other than ministers, are entitled to unemployment coverage under the South Dakota statute.[2] The court further held that the statute, as thus construed, does not violate the First Amendment (*id.* at A-9 to A-16).

SUMMARY OF ARGUMENT

I.

1. In 1976, Congress continued a consistent history of expansion of coverage under the Federal Unemployment Tax Act ("FUTA") by repealing the exemption for

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[1] The term "parochial school" sometimes is used to refer only to schools operated by a parish, but it will be used in this brief in its broader sense to refer to all church-related elementary and secondary schools.

[2] The court made clear in its opinion that this case involves no independent question of state law. The statutory question turns solely on the "congressional intent with respect to the repeal of Section 3309(b)(3) of FUTA" (Pet. App. A-5) because the state statute was intended to treat parochial schools in accordance with the conformity requirements of FUTA. See, *e.g.*, S.D. Codified Laws Ann. §§ 61-1-7, 61-1-18.1 (1978). This case, therefore, squarely presents to this Court the question of the proper interpretation of the federal statute. Cf. *United Air Lines* v. *Mahin*, 410 U.S. 623, 630-631 (1973); *State Tax Comm'n* v. *Van Cott*, 306 U.S. 511, 514-515 (1939).

employees of nonprofit elementary and secondary schools, 26 U.S.C. (1970 ed.) 3309(b)(3). The legislative history of the 1976 amendments demonstrates that Congress intended to extend FUTA coverage to all nonprofit schools, including parochial schools. The extension of coverage was designed to provide permanent unemployment protection to substantially all of the nation's wage earners and thus eliminate the need for the temporary Special Unemployment Assistance ("SUA") program established in 1974, which included parochial school employees. Moreover, although Congress was surely aware that the vast majority of nonprofit school employees work in parochial schools, it repeatedly stated that FUTA coverage was being extended to nonprofit schools without ever suggesting that parochial schools were to be excluded. Particularly in light of the fact that the consequence of exempting parochial school employees from the 1976 coverage would have been to leave them without any unemployment protection, because of the elimination of SUA, it is clear that Congress would have said so explicitly if it had intended to exempt them.

Indeed, there is affirmative evidence that Congress intended to extend coverage to parochial school employees. The Senate Report estimated that 242,000 additional employees of nonprofit schools would be added by the 1976 legislation—a number that includes parochial school employees. In addition, Congress manifested its intent to eliminate coverage disparities between similar types of employees, such as between elementary and secondary school teachers and college teachers. There is no doubt that Congress intended in 1970 that church-related colleges be covered under FUTA; only schools devoted to preparing students for the ministry were exempt. Congress' apparent intent to extend FUTA coverage to elementary and secondary school employees on the same basis as employees of institutions of higher education is realized by preserving the same distinction—schools devoted to preparing students for the ministry (and part-time exclusively religious schools, such as Sunday schools) are exempt but other church-related schools are covered.

2. The exemption of Section 3309(b)(1) for employees of a "church" or an organization "operated primarily for religious purposes" is not inconsistent with Congress' intent to extend coverage to parochial school employees. Petitioners mistakenly contend that the "church" exemption plainly extends to parochial school employees if the school is not separately incorporated from the church. However, churches and schools are generally separately organized and recognized as separate entities. In line with this common perception, the Department of Labor has consistently followed its interpretation, issued contemporaneously with the enactment of the Section 3309(b)(1) exemption, that "church" was used by Congress in the limited sense of an individual house of worship. This interpretation accords with Congress' intent in 1976 to cover parochial school employees and presents no administrative problems—individuals employed in the operation of the house of worship are exempt from FUTA coverage but individuals employed in the operation of the school are covered. Petitioners' interpretation, on the other hand, would require a case-by-case inquiry into the corporate form of each school and would result in disparate treatment for schools of different faiths because some religions customarily establish their parochial schools as independent corporate entities. Rather than imputing to Congress the intent to create such an arbitrary system, Congress' expressed intent in 1976 to cover parochial schools should be vindicated by interpreting "church" in Section 3309(b)(1) in terms of a house of worship.

Congress clearly indicated that the Section 3309(b)(1)(B) exemption for organizations "operated primarily for religious purposes" is to be narrowly construed in the context of educational institutions. The Congressional Reports explicitly stated that church-related colleges are not included within this exemption. Only schools devoted primarily to preparing students for the ministry and schools engaged exclusively in religious instruction (such as Sunday schools) are exempt under Section 3309(b)(1)(B).

Great deference should be given to the Secretary of Labor's interpretation of the FUTA coverage requirements because the Secretary is charged with the administration of the FUTA conformity program. See *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). This interpretation was contemporaneously adopted and has been consistently maintained. In its explanation of the 1970 amendments to state agencies, the Department of Labor established that the "church" exemption is to be interpreted in terms of a house of worship. The Secretary has never deviated from this interpretation, and his ruling that the 1976 amendments extended FUTA coverage to parochial elementary and secondary school employees is a logical outgrowth of this interpretation. Moreover, the Secretary's interpretation accords with the well established principle that remedial statutes are to be construed liberally in favor of the workers they are designed to protect.

3. This Court's decision in *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979), has no application here. First, the extension of FUTA to parochial school employees, which only affects whether payments are made to an individual after his employment relationship with a school has been terminated, raises no serious First Amendment problems akin to those involved in the application of the National Labor Relations Act to teachers in parochial schools. Indeed, it is petitioners' interpretation of FUTA, which makes coverage depend on the corporate form of the school or the degree to which a religious purpose permeates school activities, that raises more serious questions. Second, Congress' affirmative action in repealing the school exemption in 1976 contrasts with the agency initiative involved in *Catholic Bishop*.

II.

1. Because FUTA does not aid religion and is not a step toward the establishment of religion, it does not violate the Establishment Clause of the First Amendment. Moreover, FUTA does not foster excessive governmental entanglement with religion. The only duty imposed on parochial schools under FUTA is to keep certain employ-

ment records, which are considerably less extensive than other recordkeeping requirements that this Court has held not to constitute excessive entanglement.

Petitioners' assertion that FUTA creates unconstitutional entanglement is based upon certain alleged consequences of FUTA coverage that, in fact, would not occur. Because all lay parochial school employees are covered by FUTA, no inquiry need be made into the religious nature of an employee's service. By the same token, a hearing on an employee's eligibility for benefits would not result in entanglement, even if an employee was released on the ground of teaching false doctrine. An eligibility hearing would determine only whether an employee is entitled to benefits; no determination of church doctrine would be made. Indeed, although some inquiry into religious matters for the purposes of resolving secular issues does not violate the First Amendment (see *Wisconsin* v. *Yoder*, 406 U.S. 205, 215-216 (1972)), even an inquiry into church doctrine would almost never be necessary. A parochial school is free to establish work rules of its choice and an employee may be discharged for violating them; the question whether those work rules or their application correctly reflect church doctrine is irrelevant to the eligibility hearing. Accordingly, FUTA creates only a very minimal degree of church-state involvement, which does not approach the level of an Establishment Clause violation.

2. Because the minimal entanglement involved here in no way hinders petitioners' exercise of their religion, it does not violate the Free Exercise Clause. Although FUTA imposes no tax liability on parochial schools, it does create the possibility of a limited financial obligation on a school if one of its employees collects unemployment benefits. It is well settled, however, that a statute does not violate the Free Exercise Clause merely because it imposes an expense on the practice of religion. The compelling government interest of providing unemployment protection that is advanced by FUTA justifies the minimal entanglement and limited financial ob-

ligations that may result from its extension to parochial schools. The application of FUTA in a religiously neutral fashion to employees of nonprofit schools does not violate the First Amendment.

ARGUMENT

I. FUTA REQUIRES PARTICIPATING STATE UNEMPLOYMENT COMPENSATION PROGRAMS TO PROVIDE COVERAGE TO EMPLOYEES OF PAROCHIAL ELEMENTARY AND SECONDARY SCHOOLS

A. The 1976 Amendments To FUTA Were The Culmination Of A Series Of Congressional Expansions Of FUTA's Coverage

The federal-state unemployment insurance program arose in response to the severe unemployment caused by the Great Depression. To encourage the enactment of state unemployment compensation laws, Congress enacted Title IX of the Social Security Act of 1935, which imposed on covered employers an excise tax consisting of a percentage of wages payable to their employees. However, these employers were allowed a credit against this federal tax liability of up to 90% of their contributions into a fund established under a federally approved state unemployment compensation law. See Pub. L. No. 271, ch. 531, Sections 901-903, 49 Stat. 639-640. All 50 states subsequently adopted unemployment compensation laws that conformed to federal requirements. The federal standards for unemployment compensation coverage remained substantially unchanged for two decades. Beginning in the mid-1950's, however, there commenced a steady expansion of unemployment insurance coverage that has continued to the present day.[3]

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[3] In 1954, for example, Congress reduced the minimum number of employees required for an employer to be covered from eight to four and enacted an unemployment compensation program for federal employees. Pub. L. No. 767, ch. 1212, 68 Stat. 1130. In 1958, Congress extended coverage to ex-servicemen. Pub. L. No. 85-848, 72 Stat. 1087.

The first extension of unemployment coverage directly relevant to this case occurred when Congress enacted the Employment Security Amendments of 1970, Pub. L. No. 91-373, 84 Stat. 695. Among other changes, these amendments required state laws, as a condition of certification, to cover employees of nonprofit organizations,[4] state hospitals and institutions of higher education. 26 U.S.C. 3309(a). These employees had previously been excluded under 26 U.S.C. 3306(c)(7), (8). However, Congress also established several exemptions from this expanded coverage, including the exemptions for service performed in the employ of a "church or convention or association of churches," "an organization which is operated primarily for religious purposes" and operated by a church, or an elementary or secondary school. 26 U.S.C. (1970 ed.) 3309(b)(1), (3).

In 1974, Congress determined that the existing coverage under the unemployment compensation system was still inadequate. Accordingly, it enacted, as a temporary measure, the Emergency Jobs and Unemployment Assistance Act of 1974, Pub. L. No. 93-567, 88 Stat. 1845. The Act established a Special Unemployment Assistance ("SUA") program to provide benefits for the approximately 12 million workers who were not protected by the permanent unemployment compensation program, including employees of parochial elementary and secondary schools. State unemployment compensation agencies administered the SUA program, with the federal government assuming the costs of benefits and administration.

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[4] Although the 1970 amendments extended FUTA coverage to employees of nonprofit organizations, they impose no federal tax on these organizations. The definition of "employment" under 26 U.S.C. 3306(c)(8) continues to exclude service performed in the employ of an organization exempt from federal income tax under 26 U.S.C. 501(c)(3). The organization may meet its unemployment insurance obligations under state law either by making regular payments to the state unemployment fund or by reimbursing the fund for compensation paid to the organization's employees. 26 U.S.C. 3309(a)(2).

B. Congress Intended To Extend Coverage To Employees Of Parochial Elementary And Secondary Schools In The 1976 Amendments To FUTA

The Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 Stat. 2667, superseded the temporary SUA program and further expanded the coverage of FUTA in several respects, including the repeal of the exemption for employees of elementary and secondary schools previously contained in 26 U.S.C. 3309(b)(3). Congress' concern over FUTA's failure to cover certain classes of employees, which led to the establishment of the SUA program, was the primary motivation for the expansion of coverage in 1976. The House Report specified that the 1976 amendments were designed to "provide coverage under the permanent Federal-State Unemployment Compensation law for *substantially all* of the nation's wage and salary earners and thereby eliminate the need for the temporary Special Unemployment Assistance program." H.R. Rep. No. 94-755, 94th Cong., 1st Sess. 1 (1975) (emphasis added).

Specifically, Congress' concern was "to provide equal treatment of all the nation's wage and salary workers under the permanent unemployment compensation law" (H.R. Rep. No. 94-755, 94th Cong., 1st Sess. 2 (1975)) by eliminating coverage disparities to the extent possible among workers who do the same kind of work. Rep. Corman, chairman of the Subcommittee on Unemployment Compensation of the Committee on Ways and Means, and a principal proponent of the amendments, specifically noted the lack of justification for different treatment under FUTA of workers who do the same kind of work, concluding that "[i]t is time all employees and employers were treated the same under the UC program." 122 Cong. Rec. 22900 (1976). Rep. Ullman, chairman of the full committee, similarly explained that the amendments would "reduce the inequities that currently exist" and "provide workers, who do the same kind of work, the same protection under the unemployment compensation program, regardless of their employer." 122 Cong. Rec. 22518, 22519 (1976). Peti-

tioners' interpretation that teachers in parochial elementary and secondary schools are exempt, although teachers in all public and other private schools, and even in church-related colleges, are covered, is inconsistent with this basic congressional objective.

A substantial number of employees previously covered only by the temporary SUA program were brought within FUTA's coverage by Congress' repeal of the Section 3309(b)(3) exemption for employees of elementary and secondary schools. Congress repeatedly explained that this amendment "require[s] the States to extend the coverage of their unemployment programs to employees of nonprofit elementary and secondary schools." S. Rep. No. 94-1265, 94th Cong., 2d Sess. 2 (1976). See also *id.* at 9-10; H.R. Rep. No. 94-755, 94th Cong., 1st Sess. 2, 6, 41, 56 (1975). The legislative history makes clear that this extension of coverage to nonprofit schools was intended to include parochial schools, which contain approximately 86% of the students enrolled in those schools.[5]

Congress' objective to include employees of nonprofit schools within FUTA's coverage is stated without qualification. There is no indication at all that, despite the use of this broad language, Congress intended to limit coverage to the small minority of nonprofit schools that lack church affiliation. Indeed, the House Report on the 1976 amendments expressly declares:

> Section 115(b) also has the effect of requiring the State to pay unemployment compensation on the basis of services performed for *all* educational institutions. Under existing law, the State is only required to provide coverage of services performed for institutions of higher education.

H.R. Rep. No. 94-755, 94th Cong., 1st Sess. 56 (1975) (emphasis added). Congress obviously was aware that

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[5] Rice, *Conscientious Objection to Public Education: The Grievance and the Remedies*, 1978 B.Y.U. L. Rev. 847, 847 (1978). See also U.S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States* 134 (1976).

parochial schools constituted the overwhelming majority of private elementary and secondary schools, and surely would have said so explicitly if it had intended to exempt them. This is particularly so because, as a result of the elimination of the SUA program, the consequence of exempting parochial school employees in 1976 would have been to eliminate the unemployment protection for these employees that Congress had deemed necessary in enacting and extending SUA.[6] Thus, Congress intended, as it plainly said, to extend FUTA coverage to employees of all nonprofit elementary and secondary schools.

This conclusion is further buttressed by the statistics cited in the Senate Committee Report. In a table listing the groups of employees affected by the 1976 amendments, the Committee estimated that 242,000 additional employees of nonprofit organizations would be covered—a number that corresponds to the total number of employees of nonprofit schools, including parochial schools. S. Rep. No. 94-1265, 94th Cong., 2d Sess. 8 (1976).[7] The source of the 242,000 statistic is not specified in the Report, but the Secretary of Labor has specifically found, based on the record developed in an administrative conformity proceeding, that the statistic was furnished to Congress by the Department of Labor as the Department's best estimate of the *total* number of nonprofit school employees not covered by FUTA prior to 1976, including parochial school employees. 44 Fed. Reg. 64378, 64381 (1979).[8] Petitioners object (Br. 24)

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[6] Congress' concern over leaving these employees without protection is manifested by the fact that, although SUA was originally authorized for only one year, Congress twice extended it until the 1976 amendments became effective. Emergency Compensation and Special Unemployment Assistance Act of 1975, Pub. L. No. 94-95, Section 201, 89 Stat. 240; Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, Section 601, 90 Stat. 2689-2690.

[7] Because the only change in FUTA relating to nonprofit organizations was the repeal of the Section 3309(b)(3) exemption for employees of elementary and secondary schools, this number refers only to *school* employees.

[8] The Secretary's decision in that proceeding to deny certification to the unemployment compensation programs of Alabama and

that certain statistics indicate that there were slightly more than 242,000 teachers in nonprofit schools in 1974, the year on whose data the table in the Report was based, but it is nevertheless clear that the table includes parochial school employees.[9] Because parochial schools contain approximately 86% of the students enrolled in nonprofit schools in the United States, any realistic estimate of nonprofit school employees that excludes parochial school employees would be less than 50,000. Accordingly, there can be no doubt that the 242,000 statistic includes parochial school employees, and that the Senate Report thus indicates that Congress contemplated that the repeal of Section 3309(b)(3) would extend FUTA coverage to those employees.

There is additional affirmative evidence of Congress' intent to extend coverage to parochial school employees. Congress stated as one of the goals of the 1976 amendments the elimination of irrational disparities in unemployment coverage between employees who perform equivalent work (see page 9, *supra*). The extension of coverage to employees of nonprofit elementary and secondary schools was specifically aimed at this goal of providing equal treatment. H.R. Rep. No. 94-755, 94th Cong., 1st Sess. 2 (1975). In line with this goal, both committee reports, immediately after declaring Congress' intent to extend FUTA coverage to employees of nonprofit elementary and secondary schools, noted that existing law required coverage only of employees of institutions of higher education. S. Rep. No. 94-1265, 94th Cong., 2d Sess. 2 (1976); H.R. Rep. No. 94-755, 94th Cong., 1st Sess. 56 (1975). In addition, Rep. Corman cited as an

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Nevada was set aside by the Fifth Circuit. *State of Alabama* v. *Marshall*, 626 F.2d 366 (1980), petition for cert. pending, No. 80-922. The court's ruling was based on its interpretation of the statute and did not disturb the Secretary's findings of fact.

[9] Petitioners are apparently referring to Census Bureau data that indicate that there were 261,000 full-time teachers in nonprofit elementary and secondary schools in 1975. See Pet. App. A-8 n.5. The statistic supplied to Congress by the Department of Labor was obtained from other sources, and the variation between the two numbers is not significant.

example of the inequities to be cured by the 1976 amendments the fact that "[c]ollege teachers have unemployment compensation protection under the permanent program mandated by federal law; high school and elementary school teachers do not." 122 Cong. Rec. 22899 (1976). The 1976 amendments thus were intended to eliminate a disparity in unemployment protection by extending FUTA coverage to elementary and secondary school employees on the same terms as workers employed in higher education.

Congress extended FUTA coverage to college and university employees in 1970 at the same time that it enacted the Section 3309(b)(1) exemption for church employees that is at issue here. As the South Dakota Supreme Court found (Pet. App. A-7 to A-8), the legislative history of the 1970 amendments demonstrates that Congress did not contemplate that the Section 3309(b)(1) exemptions would apply to church-related colleges. On the contrary, Congress made it quite clear that employees of a church-related college were covered under FUTA, with the exceptions of a "college devoted primarily to preparing students for the ministry * * * [or] a novitiate or a house of study training candidates to become members of religious orders." S. Rep. No. 91-752, 91st Cong., 2d Sess. 48-49 (1970); H.R. Rep. No. 91-612, 91st Cong., 1st Sess. 44 (1969). As the court below noted (Pet. App. A-7), the Department of Labor has followed this mandate and has consistently interpreted the 1970 amendments as requiring coverage of all colleges and universities other than seminaries and novitiates. Thus, the intent in 1976 to extend FUTA coverage to elementary and secondary school employees on the same basis as university employees is realized only if employees of church-related schools, with the exception of schools whose primary function is to prepare students for the ministry (or which are exclusively religious schools, such as Sunday schools), are covered.

C. Section 3309(b)(1) Is Consistent With The Congressional Intent To Extend Coverage To Parochial School Employees

Petitioners contend (Br. 11) that the plain meaning of 26 U.S.C. 3309(b)(1) exempts parochial school employees from FUTA coverage, and therefore the congressional intent in enacting the 1976 amendments is irrelevant. Cf. *State of Alabama* v. *Marshall*, 626 F.2d 366 (5th Cir. 1980), petition for cert. pending, No. 80-922. Where legislative history is relevant to the determination of congressional intent, however, this Court has stated repeatedly that it should not be ignored, even if the statutory language appears to be clear on "superficial examination." See, *e.g.*, *Train* v. *Colorado Public Interest Group*, 426 U.S. 1, 9-10 (1976). In any event, far from being clear, the statutory language involved in this case is quite ambiguous.

Petitioners argue that employees of a parochial school are plainly employees of a church, at least where the school is not incorporated as a separate legal entity. It is commonly recognized, however, that churches and parocial schools are separate organizations. For example, teachers at parochial schools are ordinarily thought of as school teachers, not church teachers. Contemporaneously with the enactment of Section 3309(b)(1), the Department of Labor issued an interpretation of "church" that accords with this ordinary conception of churches and schools. In a compilation of materials prepared for the purpose of advising state unemployment compensation agencies what legislative changes and administrative interpretations would be necessary to bring their state programs into conformity with the 1970 amendments to FUTA, the Department of Labor explained that as used in Section 3309(b)(1), "the word 'church' is used in its limited sense and is synonymous with an individual 'house of worship' maintained by a particular congregation." U.S. Department of Labor, *Draft Legislation to Implement the Employment Security Amendments of 1970* at 27, summarized at 1B Unempl. Ins. Rep. (CCH) § 1356,

at 4349 (1977) (hereinafter "*1970 Draft Legislation*"). See Pet. App. A-43. This interpretation of "church" is more consistent both with the common usage of the word and with Congress' overriding goal of bringing as many employees as possible under FUTA's protection than is petitioners' suggestion that the definition of a "church" depends upon its corporate structure.[10]

The manifest congressional intent in 1976 to extend FUTA coverage to employees of all nonprofit elementary and secondary schools is critical to a determination of which of these two possible interpretations is the correct one. The 1976 legislative history clearly indicates that Congress understood the word "church" in Section 3309 (b) (1) to have the narrower meaning ascribed to it by the Department of Labor's interpretation. Otherwise, Congress' intent to cover parochial school employees would be thwarted. This conclusion is reinforced by the fact that Congress made no attempt in 1976 to alter the established interpretation of the Department.

Application of this interpretation presents few administrative problems. Whether or not they are separately incorporated, the house of worship and the school are generally separately organized. Employees who are employed in the operation of the school are covered under FUTA (unless they are exempt as ministers under Section 3309(b) (2)), and those employed in the operation of the house of worship are exempt.[11]

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[10] For example, under petitioners' interpretation, even employees engaged in a profit-making business operated by a church would be exempt from FUTA coverage, although the business's income would be taxable under 26 U.S.C. 511.

[11] Certainly, the record in this case reveals no difficulty in distinguishing between school employees and church employees. The principal of St. Martin's Evangelical Lutheran Church School testified at the administrative hearing in this case that the school staff consisted of himself, one male teacher, four female teachers, and three clerical and maintenance employees, one of whom, a janitor, also worked for the church (Tr. 25, 28). The annual catalog of petitioner Northwestern Lutheran Academy lists all of the institution's employees by name and position (Tr. 34-35).

Adoption of petitioners' interpretation, on the other hand, would create serious administrative problems in addition to defeating Congress' intent to extend coverage to parochial school employees. Petitioners, like many parochial schools, have no corporate existence independent of a church or association of churches. Many other parochial schools, however, are not organized in this fashion.[12] Under petitioners' view, the state would be required to investigate the corporate form of each parochial school in order to determine whether its employees are covered by the unemployment insurance program. More significantly, employees of schools that are similar in all respects, apart from corporate form, would be subject to different treatment under FUTA. There is no basis for ascribing to Congress the intent to create such an arbitrary system, which would allow unemployment insurance protection for school employees to vanish with changes in corporate structure. Rather, "church" should be interpreted narrowly, as it consistently has been by the Secretary of Labor, in order to effectuate Congress' intent.[13]

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[12] For example, approximately 40% of Catholic secondary schools are "administered educationally and financially by religious institutes more or less independently of parish or diocese." J. M. Lee, "Catholic Education in the United States," in *Catholic Education in the Western World* 271 (Lee ed. 1967). Similarly, Jewish day schools are frequently autonomous entities. These schools are "not controlled by any central religious authority. Both the program and administration are directed by a local private group, conducted democratically and responsive to the needs and wishes of its clientele." 2 American Association for Jewish Education, *Jewish Education Register and Directory* 2 (1959). Quaker schools may also be organized in this fashion. See, *e.g.*, Brief of Germantown Friends School and Frankford Friends School as Amici Curiae at 13-17.

[13] Petitioners rely (Br. 14) on interpretations of the word "church" under unrelated sections of the Internal Revenue Code. However, Congress' intent in using the word "church" varies depending upon the purpose of the statutory provision in which it is used, and these other interpretations are of little relevance here. Moreover, "church" exemptions are often given a restrictive reading. See *De La Salle Institute* v. *United States*, 195 F. Supp. 891, 898, 906 (N.D. Cal. 1961) (parochial school is not a "church"

Petitioners also contend (Br. 16-21) that employees of parochial schools are exempt from FUTA coverage on the ground that they are employed by an organization "operated primarily for religious purposes" under Section 3309(b)(1)(B). As the South Dakota Supreme Court found, however, Congress intended that this exemption "be narrowly construed, at least as applied to educational institutions" (Pet. App. A-7). Although parochial schools do serve a religious purpose, they serve other purposes as well. Indeed, the South Dakota appeals referee specifically found that the primary purpose of the schools in this case is not religious, but rather to offer a general education (*id.* at A-43 to A-44). In any event, Congress did not intend the existence of a religious purpose in such schools to be a ground for exempting their employees from coverage.[14]

The 1970 legislative history clearly indicates Congress' view of the limited scope of the Section 3309(b)(1)(B) exemption in the context of educational institutions. A "college devoted primarily to preparing students for the ministry" or a "novitiate" is covered by the exemption, but a church-related college is not. S. Rep. No. 91-752, 91st Cong., 2d Sess. 48-49 (1970); H.R. Rep. No. 91-612,

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within the meaning of 26 U.S.C. (1958 ed.) 511). Here, Congress clearly intended to bring employees of tax-exempt schools within FUTA's coverage, and the language of the pertinent exemptions should be interpreted in accordance with that purpose.

[14] This Court's decisions holding unconstitutional certain forms of governmental aid to parochial schools, on which petitioners rely (Br. 18-20), are not to the contrary. Those decisions involve establishment problems of aid to religious institutions, rather than free exercise claims of exemption from economic regulation designed to benefit employees. The Court therefore made no inquiry into the question whether parochial schools are operated primarily for religious purposes, since the First Amendment prohibits aid to religious activity even if predominantly nonreligious purposes are intermixed with the religious purposes of the activity. Thus, in the school aid cases, the Court's inquiry did not go beyond determining whether there was a "potential for impermissible fostering of religion" in the challenged aid to parochial schools. *Meek* v. *Pittenger*, 421 U.S. 349, 372 (1975); *Lemon* v. *Kurtzman*, 403 U.S. 602, 619 (1971).

91st Cong., 1st Sess. 44 (1969). Similarly, other church-related charitable organizations, such as orphanages or homes for the aged, are not covered by the exemption although they undoubtedly were established and are operated in the furtherance of a religious purpose. *Ibid.* In the context of educational institutions, therefore, Congress' intent in enacting Section 3309(b)(1)(B) would extend to "primarily religious" schools such as novitiates or "Sunday schools," but not to church-related elementary and secondary schools, which provide a general education subject to state certification requirements.[15] Thus, Congress' intent to extend FUTA coverage in 1976 to parochial school employees is entirely consistent with the Section 3309(b)(1)(B) exemption that it passed in 1970.

D. Established Principles Of Statutory Construction Support The Decision Below

1. *The Decision Below Accords Proper Deference to the Contemporaneous and Consistent Administrative Construction of Section 3309*

This Court has established the principle that:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the [interpretation], we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute * * *.'"

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[15] The different nature of elementary and secondary schools is apparent from the extensive state accreditation requirements imposed upon them. The schools are required by state law to provide instruction in a number of secular subjects, which must be taught by state-certified teachers. S.D. Compiled Laws Ann. §§ 13-4-2, 13-33-4 to 13-33-7, 13-33-11, 13-42-2 (1975). Indeed, the schools are generally required to maintain the approval of the state superintendent of elementary and secondary education, who is to "exercise supervision" over the schools. S.D. Compiled Laws Ann. § 13-4-1 (1975).

Udall v. *Tallman*, 380 U.S. 1, 16 (1965). See also *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 107 (1979). Here, the Department of Labor is responsible for administering the FUTA conformity program, and its interpretation of the conformity requirements is entitled to considerable deference. See *AFSCME* v. *City of Cleveland*, 484 F.2d 339, 344 (6th Cir. 1973).

Contrary to petitioners' assertion (Br. 21-22), the Secretary of Labor's interpretation of FUTA is contemporaneous and has been consistently maintained. The Secretary's interpretation of Section 3309(b)(1) that "church" is to be defined in its limited sense as an individual "house of worship"—the interpretation rejected by petitioners—was issued contemporaneous with the 1970 amendments in the *1970 Draft Legislation* sent by the Secretary to state agencies to guide them in bringing state laws into conformity with FUTA requirements. The Secretary has never deviated from this interpretation, and it, accordingly, is entitled to substantial deference. Moreover, Congress' failure to alter this interpretation, which had been in existence for six years, when it passed the 1976 amendments creates an even stronger "presumption in favor of the administrative interpretation." *Costanzo* v. *Tillinghast*, 287 U.S. 341, 345 (1932). See also *Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *Better Business Bureau* v. *United States*, 326 U.S. 279, 286 (1945). As the South Dakota Supreme Court found, the Secretary's post-1976 interpretation that FUTA coverage extends to parochial elementary and secondary school employees "is a logical and necessary extension of the position * * * taken without objection since 1970" (Pet. App. A-9).

Petitioners argue, however, that two memoranda issued by the Department of Labor to state agencies in December 1976 and February 1977 took the position that, notwithstanding the repeal of Section 3309(b)(3), parochial school teachers were still exempt under Section 3309(b)(1). This assertion is incorrect; these memoranda

fully accord with the interpretation consistently espoused by the Secretary since 1970. The December 1976 memorandum (J.A. A-34 to A-36) poses the question whether the 1976 amendments affected parochial schools, and it answers it affirmatively:

> 1. *Question:*
>
> Do the 1976 amendments affect church related schools?
>
> *Answer:*
>
> Yes, to the extent that coverage is extended to elementary and secondary schools * * *.

The memorandum goes on to state that the 1976 amendments did not change the factors that are significant in determining whether employees of such schools qualify for any of the other exemptions in Section 3309(b) and specifically notes that the commentary in the *1970 Draft Legislation*, which includes the definition of "church" in terms of a house of worship, is "still applicable." The February 1977 memorandum (J.A. A-36 to A-39) generally addressed several factors involved in the application of the Section 3309(b)(1) exclusions and indicates no change in the longstanding Department of Labor interpretation of that Section.

In sum, the Secretary of Labor has consistently maintained that educational institutions, other than those engaged in training students for the ministry or those engaged exclusively in religious instruction (such as Sunday schools), are covered by FUTA—including church-related colleges and universities and, after 1976, elementary and secondary schools as well. This interpretation should be accorded deference by this Court.

2. *The Decision Below Properly Construes FUTA to Best Effectuate its Primary Purpose*

The fundamental purpose of a statute is a critical factor in resolving doubts about its proper interpretation. See, *e.g.*, *United States* v. *Bacto-Unidisk*, 394 U.S. 784, 799 (1969). FUTA, which has its roots in the Depression era, is aimed at minimizing the economic hardships

resulting from unemployment. Such "[r]emedial social legislation * * * is to be construed liberally in favor of the workers whom it was designed to protect." *Wirtz* v. *Ti Ti Peat Humus Co.*, 373 F.2d 209, 212 (4th Cir.), cert. denied, 389 U.S. 834 (1967). See also *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 268 (1977); *United States* v. *Silk*, 331 U.S. 704, 712 (1947). The corollary of this principle is that exemptions from the scope of such remedial legislation are to be narrowly construed. See *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *A. H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493 (1945); *Wirtz* v. *Ti Ti Peat Humus Co.*, *supra*, 373 F.2d at 212.[16] A narrow construction of the exemptions to FUTA coverage is especially appropriate here because of the consistent history of congressional expansion of FUTA coverage and, in particular, the specific intent of Congress in adopting the 1976 amendments to cover substantially all the employees who were covered under the temporary SUA program, which included parochial school employees. See pages 7-9, *supra*.

E. This Court's Decision In *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979), Does Not Require That Parochial School Employees Be Exempt From FUTA Coverage

In *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979), this Court held that the National Labor Relations Act of 1935 (NLRA) does not apply to teachers in parochial schools. The Court found that application of the NLRA to parochial school teachers would raise "serious First Amendment questions." 440 U.S. at 501-504. Accordingly, the Court ruled that it would not construe the statute as applying to such teachers in the absence of an "affirmative intention of the Congress clearly expressed." *Id.* at 501. After examining the statute and legislative history, the Court concluded that an intent to cover parochial school teachers was not ap-

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[16] In addition, the burden of proof rests on the employer to demonstrate that it falls within the claimed exemption. See *Schultz* v. *Louisiana Trailer Sales, Inc.*, 428 F.2d 61, 67 (5th Cir. 1970).

parent, and therefore it held that the NLRA did not apply. *Id.* at 507.

Catholic Bishop has no application to the present case. First, extension of FUTA coverage to parochial school employees presents no serious First Amendment problems. See point II, *infra.* As the court below found (Pet. App. A-15 to A-16), the minimal church-state entanglement that might result under FUTA does not approach the potential effect on parochial school administration identified by this Court in *Catholic Bishop.* There, the possible imposition of mandatory collective bargaining concerning the teaching mission of parochial schools raised the possibility that the National Labor Relations Board would become involved in "nearly everything that goes on in the schools." *NLRB* v. *Catholic Bishop of Chicago, supra,* 440 U.S. at 503. Here, by contrast, the state would be concerned only with unemployment payments to an individual after his employment relationship with the school had been terminated, which would have no impact on the exercise of the school administration's discretion in operating the school.

Indeed, more serious constitutional questions would be raised by petitioners' interpretation of FUTA than are raised by the Secretary's interpretation. If coverage were to depend upon the corporate form of the school, disparate treatment of different religions might result. See note 12, *supra.* Moreover, petitioners suggest (Br. 16-18) that the determination whether a school is "primarily religious," within the meaning of 26 U.S.C. 3309(b)(1), requires a comparison of the religious and secular aspects of the school, including the degree to which religious teachings permeate the curriculum, which would necessarily involve a much more intrusive inquiry into the school's operations and religious aspects than results from the Secretary's interpretation. See *New York* v. *Cathedral Academy,* 434 U.S. 125, 133 (1977).

Second, there is an "affirmative intention of Congress clearly expressed" here sufficient to meet the *Catholic Bishop* test. In *Catholic Bishop,* the Court noted that the Board unilaterally had altered its practice concerning

private schools although no change was made in the NLRA. 440 U.S. at 497. Here, by contrast, Congress acted affirmatively to repeal the school exemption in 1976, and the Department of Labor's interpretation at issue is a direct consequence of that action. Accordingly, *Catholic Bishop* provides no basis here for deviating from the standard inquiry into congressional intent.

II. FUTA COVERAGE OF PAROCHIAL SCHOOL EMPLOYEES DOES NOT VIOLATE THE FIRST AMENDMENT

Petitioners contend (Br. 29-41) that extension of FUTA coverage to employees of parochial elementary and secondary schools violates both the Establishment Clause and the Free Exercise Clause of the First Amendment. Although these two clauses serve a common purpose and may overlap, "they forbid two quite different kinds of governmental encroachment upon religious freedom." *Engel* v. *Vitale*, 370 U.S. 421, 430 (1962). See also *Abington School District* v. *Schempp*, 374 U.S. 203, 221 (1963). Accordingly, we address each of these contentions in turn.

A. FUTA Coverage Of Parochial School Employees Does Not Violate The Establishment Clause

At the outset, we note that petitioners do not appear to have made out a prima facie claim of an Establishment Clause violation.[17] The Establishment Clause is violated by the enactment of a law that establishes a religion or takes a step that could lead to such establishment. *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971); *Engel* v. *Vitale*, *supra*, 370 U.S. at 430; see Pet. Br. 29.

[17] Petitioners are basically in the posture of free exercise claimants and make no contentions based on alleged establishment of other religions through aid to other schools. Petitioners' Establishment Clause claims serve, however, to illuminate their free exercise claims and arguably may be raised independently because of this Court's recognition that "the Establishment Clause * * * rested on the belief that a union of government and religion tends to destroy government and to degrade religion." *Engel* v. *Vitale*, *supra*, 370 U.S. at 431.

This Court has recognized a three-pronged analysis where a statute raises an Establishment Clause question. A statute "does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster excessive governmental entanglement with religion." *Committee for Public Education and Religious Liberty* v. *Regan*, 444 U.S. 646, 653 (1980). Petitioners contend that the third requirement, excessive entanglement with religion, is violated here. But petitioners do not suggest how the basic prohibition of the Establishment Clause against aid to religion is involved here. Those decisions of this Court that have overturned legislation because of excessive entanglement, or even upheld legislation against an entanglement objection, involved laws that aided religious organizations, to the extent that the laws affected them. See, *e.g.*, *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973) (school aid); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) (school aid); *Walz* v. *Tax Commission*, 397 U.S. 664 (1969) (tax exemption). Here, however, the entire thrust of petitioners' argument is that FUTA coverage of parochial school employees hinders, rather than assists, the exercise of religion. Such a claim, in our view, lies only under the Free Exercise Clause. But even if the traditional Establishment Clause analysis were appropriate here, FUTA does not foster an excessive entanglement with religion.

It is not disputed (see Pet. Br. 31-32) that certain contacts between church and state are inevitable, and the question whether entanglement is "excessive" is one of degree. See *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 614; *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 674. Here, the only requirement necessarily imposed on petitioners by FUTA coverage (apart from possible contributions to the state unemployment fund discussed *infra*) is the duty under state law to keep accurate employment records, which are subject to inspection by the South Dakota Employment Security Division, and the duty to make related reports to the Division. S.D. Codi-

fied Laws Ann. §§ 61-3-2, 61-3-3 (1978). These records concern such matters as the work hours and wages of each employee; the date each employee was hired and separated from employment; and the total number of employees and wages paid in each calendar quarter. See S.D. Employment Security Division Rules 47:06:02:01 to 47:06:02:06, 9 Unempl. Ins. Rep. (CCH) ¶¶ 6101-6106 (1976). Surely, this routine recordkeeping requirement, which is similar to that associated with withholding income tax from a school's employees (see 26 C.F.R. 31.6001-5), does not violate the First Amendment. Indeed, the recordkeeping involved here is more routine and less extensive than the recordkeeping involved in the reimbursement process in *Committee for Public Education and Religious Liberty* v. *Regan*, *supra*, which this Court held not to constitute excessive entanglement. 444 U.S. at 659-661.[18]

Petitioners' primary constitutional objection, however, is based not on the actual requirements of the unemployment laws, but on certain consequences of the application of those laws that petitioners mistakenly claim would result. Petitioners contend (Br. 32-37) that the degree of state involvement with parochial schools would be "overly severe" in two instances: (1) in determining which services at parochial schools are exempt under Section 3309(b)(1) as "strictly church duties" and (2) in deciding whether an employee is ineligible for unemployment benefits because he was fired for misconduct. These contentions are based on a misunderstanding of the requirements of FUTA; application of FUTA to parochial school employees does not yield the consequences to which petitioners object.

First, contrary to petitioners' assertion (Br. 32-33), FUTA does not require an inquiry into the religious nature of various activities nor into the subject matter of

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[18] In *Regan*, for example, the schools were required to determine the proportionate share of teachers' salaries and fringe benefits attributable to the administration of examinations and recording of data that were required by the State. 444 U.S. at 659-660.

courses taught at the school. All lay parochial school employees [19] are covered by the unemployment compensation system and therefore all lay teachers are covered regardless of whether they teach religious or secular subjects. Thus, no inquiry will be made into questions such as the degree of religious overtones that are placed on otherwise secular subjects such as world history (see Pet. Br. 32-33)—an inquiry that arguably would raise constitutional questions.

FUTA differentiates between employees of the church and employees of the school; it makes no distinction between employees depending on the religious nature of their services. The house of worship and the parochial school are organizationally and functionally distinct, and it is ordinarily a simple matter to determine whether an employee is employed by one or the other.[20] There may be isolated instances where a person has some connection to the school, but is actually employed by the church, for example, where the secretary to the church pastor has an office in the school. This person is not a school employee and therefore is not covered under FUTA, as explained in the Department of Labor's Unemployment Insurance Program Letter No. 39-78, which states that FUTA does not extend to "strictly church duties performed by church employees at the schools pursuant to their church responsibilities" (J.A. A-42). Application of this principle requires no inquiry into religion and, indeed, no extensive inquiry of any kind.

Second, petitioners contend that inquiries into the circumstances of an employee's separation from service impermissibly entangle the state in religious affairs. Although FUTA does not require it, South Dakota denies or reduces benefits to a former employee who quits his job "voluntarily without good cause" or who is dismissed for

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[19] All ministers and members of religious orders employed by parochial schools are exempt under 26 U.S.C. 3309(b)(2).

[20] As noted above, the record in this case discloses no difficulty in distinguishing between the two groups of employees. See note 11, *supra*.

"misconduct connected with his work." S.D. Codified Laws Ann. §§ 61-6-13, 61-6-14 (1978). Petitioners contend (Br. 35) that there are only two possible reasons for the release of one of their teachers—teaching false doctrine or misconduct as defined by church standards—and consequently that an eligibility determination will require an impermissible inquiry into church doctrine.

At a minimum, this contention overlooks the possibility of school closings or reductions in size or programs, which can cause unemployment hardships. In any event, an eligibility determination will never require the state to disturb a church's interpretation of its doctrine. See *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 708-710 (1976). The only possible consequence of an eligibility hearing is a decision whether or not a particular employee will receive unemployment benefits. Rather, the focus of petitioners' objection seems to be that an eligibility hearing may involve some inquiry into church doctrine. Even if such an inquiry were necessary, it would not constitute a First Amendment violation. This Court has recognized that some limited inquiry into religious matters may be necessary in the course of resolving certain purely secular issues. See *Wisconsin* v. *Yoder*, 406 U.S. 205, 215-216 (1972); *United States* v. *Ballard*, 322 U.S. 78 (1944). Moreover, petitioners' objection is based on a misunderstanding of the nature of the state's inquiry in an eligibility determination. In fact, any inquiry into the nature of church doctrine will rarely, if ever, occur.[21]

The state is not concerned with the content of petitioners' religious beliefs. The eligibility hearing need only

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[21] Petitioners point to no actual claim for unemployment benefits that has necessitated inquiry into church doctrine; their objections are purely speculative. Unemployment coverage of employees of church-related schools, however, is not a new phenomenon. Parochial elementary and secondary school employees universally were covered under the temporary SUA Program from 1974 through 1977, and have since been covered under FUTA in the vast majority of states, which, like South Dakota, have adopted the Secretary of Labor's interpretation. Church-related colleges have been covered since 1970.

determine whether a claimant was discharged for "misconduct" within the meaning of state law. Failure to abide by an established work rule constitutes misconduct. Petitioners are free to establish whatever work rules they choose, including rules that correspond to their religious beliefs. Whether or not those rules correctly correspond to church doctrine is irrelevant; violation of the rules constitutes misconduct. As the court below held (Pet. App. A-14), the state "need only determine whether the employee was fired or laid off."[22] In sum, extension of FUTA to parochial school employees creates only a minimal degree of entanglement between church and state, which does not violate the Establishment Clause.

B. FUTA Coverage Of Parochial School Employees Does Not Violate The Free Exercise Clause

Petitioners also contend (Br. 39) that excessive entanglement caused by the extension of FUTA coverage to parochial school employees violates the Free Exercise Clause. There may be situations where government regulation that can be characterized as entanglement hinders the exercise of religion in violation of the Free Exercise Clause. See *Surinach* v. *Pesquera de Busquets*, 604 F.2d 73 (1st Cir. 1979). But this is not such a case.[23] As outlined above, FUTA coverage here creates a minimal degree of church-state involvement, and peti-

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[22] Amici States of Alabama and Nevada contend (Br. 26) that testimony might be adduced at an eligibility hearing concerning a discharged teacher's understanding of church doctrine in order to determine whether he "knowingly violated" it. Even if such testimony is necessary in some cases, it would not constitute an Establishment Clause violation. Where an individual's religious understanding or belief is relevant, the courts are foreclosed from determining the "truth" of that belief, but not its existence. See *United States* v. *Seeger*, 380 U.S. 163, 185 (1965).

[23] The entanglement here, even to the degree alleged by petitioners, does not approach the scope of the government interference that was held to be unconstitutional in *Surinach*. There, certain Catholic schools were ordered to provide extensive information to the Secretary of Consumer Affairs of Puerto Rico as a step toward the possible imposition of price controls on the schools. 604 F.2d at 74-75.

tioners do not suggest how this contact could hinder the free exercise of their religion.

The program that FUTA and related state statutes establish is extremely limited. It does not affect in any manner the distribution of authority within the school or the establishment of work rules or other terms and conditions of employment. The school's curriculum and its general educational or religious mission are entirely outside FUTA's scope. Nor does the program have any application to the school's personnel decisions, such as whether or whom to hire, fire, discipline or promote, or to the grounds on which those decisions may be made. It comes into play only after the employment relationship has been severed.

FUTA coverage, however, may impose a financial obligation on parochial schools. Unlike for-profit corporations, parochial schools are not subject to federal excise tax under 26 U.S.C. 3301 and are not required to make contributions to the state unemployment fund. If a school elects not to make regular contributions, however, it is obligated to reimburse the state fund for unemployment benefits paid to its employees. 26 U.S.C. 3304(a)(6)(B), 3309(a)(2). It is well settled, however, that a statute does not violate the Free Exercise Clause merely because it "operates so as to make the practice of * * * religious beliefs more expensive." *Braunfeld* v. *Brown*, 366 U.S. 599, 605 (1961). Clearly, the possibility of the limited financial obligation involved here[24] does not create the "coercive effect [on] the practice of religion" that is the crux of a Free Exercise Clause violation. See *Abington School District* v. *Schempp*, *supra*, 374 U.S. at 223.

Moreover, the compelling government interest at stake here justifies the minimal entanglement and limited financial obligations that result from the extension of FUTA coverage. This Court has noted the critical importance

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[24] There is no evidence in this case that petitioners have had to make any payments at all into the South Dakota unemployment fund.

of unemployment benefits; they "provide cash to a newly unemployed worker 'at a time when otherwise he would have nothing to spend'" and are thus essential if the worker is "to maintain [himself] at subsistence levels." *California Dep't of Human Resources* v. *Java*, 402 U.S. 121, 131-132 (1971).[25] And it is beyond dispute that religiously based activities "are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers." *Wisconsin* v. *Yoder*, *supra*, 406 U.S. at 220. This regulatory power extends to parochial schools. It has long been recognized that while the state cannot effectively shut down parochial schools, it may regulate, inspect, supervise and examine them. *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534 (1925). See also, *e.g.*, *Wolman* v. *Walter*, 433 U.S. 229, 240 (1977). In light of these principles, Congress' extension of unemployment coverage to elementary and secondary schools in a scrupulously neutral fashion—treating secular and church-related schools alike—surely does not violate the First Amendment. See *Committee for Public Education* v. *Nyquist*, *supra*, 413 U.S. at 788.

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[25] The government interest in easing the economic hardship of unemployment is no less substantial than other interests that this Court has recognized in upholding neutral legislation against a Free Exercise Clause challenge. See, *e.g.*, *Braunfeld* v. *Brown*, *supra* (state law barring retail sales on Sunday); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944) (state child labor law).

CONCLUSION

The judgment of the Supreme Court of South Dakota should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ST. MARTIN EVANGELICAL LUTHERAN CHURCH, ET AL.,
Petitioners,

v.

STATE OF SOUTH DAKOTA,
Respondent.

On Writ Of Certiorari To The Supreme Court Of South Dakota

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF UNITED STATES CATHOLIC CONFERENCE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF UNITED STATES CATHOLIC CONFERENCE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

The United States Catholic Conference respectfully moves this Court for leave to file a brief *amicus curiae* in this case. The consent of the attorney for the petitioners has been obtained. The consent of the attorney for respondent was requested but refused.

This case involves the question of whether certain church schools fall within the scope of coverage of the South Dakota unemployment compensation statute. The Supreme Court of South Dakota has held that, under the Federal Unemployment Tax Act (FUTA), the State of South Dakota must cover church schools. It reversed the South Dakota Circuit Court and held that church schools were not exempt from coverage.

The United States Catholic Conference is the civil agency of the Catholic Bishops of the United States. The Catholic Church operates a large number of elementary and secondary schools which are a fundamental part of its mission. The decision of the South Dakota Supreme Court has a significant impact on these schools and thus directly affects the important interests of the Church.

This *amicus* urges upon this Court a different view of this case than that proposed by petitioners. It is our position that it is not necessary to consider the question of the constitutionality of FUTA since a proper construction of the statute and its legislative history compels a result in favor of petitioners.

Respectfully submitted,

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STATE OF SOUTH DAKOTA,
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On Writ Of Certiorari To The Supreme Court Of South Dakota

BRIEF OF UNITED STATES CATHOLIC CONFERENCE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

IDENTIFICATION AND INTEREST OF AMICUS

The United States Catholic Conference ("USCC") is the civil agency of the Catholic Bishops of the United States. Its purpose is to unify and coordinate the activities of the Catholic people in the United States in programs and works of education, social welfare, health and hospitals, family life, immigrant aid, poverty assistance, youth activities and other endeavors considered part of its religious mission.

Among its responsibilities, the USCC is authorized to represent the Catholic Bishops who speak for the Church in the United States on matters of public concern. When deemed appropriate and permitted by court rule or practice, the USCC offers its views in litigation touching important issues affecting interests of the Church and its people in the United States.

In this case the Supreme Court of South Dakota has held that the Federal Unemployment Tax Act ("FUTA") must be interpreted to require coverage of church schools under the South Dakota Unemployment Insurance Law. The Catholic Church operates a large number of elementary and secondary schools throughout the United States. In 1980 over 9,000 Catholic elementary and secondary schools served the educational needs of almost three and a half million Catholic and non-Catholic students. These schools are a fundamental part of the mission of the Church. The imposition of taxes and regulation under FUTA upon those schools would directly affect the Church in a most significant way.

SUMMARY OF ARGUMENT

The Supreme Court of South Dakota's decision that FUTA requires coverage of employees in elementary and secondary church schools misinterprets the statute and the legislative history. Since 1970, FUTA has treated exemptions for churches and church organizations entirely in section 3309(b)(1). Section 3309(b)(3) does not in terms apply to churches or church organizations, and applicable rules of construction in light of legislative history make clear it was not intended to deal with churches and their organizations, including their schools. Indeed, neither was it intended to apply to public schools which had been exempt from FUTA coverage until 1976 under section 3306(c)(7). Rather, section 3309(b)(3) was meant to deal with schools not already exempt under earlier provisions.

If any doubt of the correctness of this construction exists, it should be resolved by established rules of strict construction which do not require an exploration of potential constitutional involvements such as was deem-

ed necessary in *N.L.R.B.* v. *Catholic Bishop*, 440 U.S. 490 (1979). Regardless of their limited nature, both in scope as well as dicta, such explorations can have practical effect on the legislative process, the interpretation and implementation of statutes, and the regulatory climate. The delicacy and importance of church-state matters call for the application of the rules of construction which call for a strict or cautious interpretation of statutes which impose taxes, or purport to abrogate rights or privileges which have become deeply rooted in the fabric of our general law and public policy. Regarding the exemption of churches from taxation, this Court has held: "Few concepts are more deeply embedded in the fabric of our national life. . . ." *Walz* v. *Tax Commissioner of City of New York*, 397 U.S. 664, 678 (1970).

ARGUMENT

Traditional Rules Of Construction Make Clear That The 1976 FUTA Amendments Were Not Intended To Extinguish Forty Years Of Exemption For Elementary And Secondary Church Schools. Suggestions Of Possible Constitutional Problems (*N.L.R.B.* v. *Catholic Bishop*) Are Unnecessary To The Interpretative Process In This Case.

There are two questions of interpretation in this case:

1. When enacted, was subdivision (b)(1) of section 3309 of FUTA intended to apply to all church schools so that the repeal of subdivision (b)(3) in 1976 had no effect on their exemption?

2. If subdivision (b)(1) was so intended, are the Lutheran schools involved here exempt within the meaning of that subdivision?

Although this *amicus* supports the petitioners' claim of exemption, it will confine its presentation to the broader question first stated.

When amended in 1976 FUTA'S exemption of churches and church organizations was contained entirely in section 3309(b)(1).

The threshold question relates to the intent of Congress in 1970 when it enacted section 3309. If at that time it did not intend section 3309(b)(3) to apply in the area of church organizations, its repeal of that subdivision in 1976 could have no effect on such organizations.[1]

FUTA was enacted in 1935. Until 1970 it exempted all religious, charitable, educational and other organizations described in section 501(c)(3) of the Internal Revenue Code ("Code") which were exempt from income tax under section 501(a) of the Code. See FUTA Section 3306(c)(8). In 1970, section 3309(a)(1)(A) was added thereby extending mandatory state coverage to non-profit organizations except for certain exemptions continued or provided under section 3309(b).

When Congress enacted section 3309(b) it carefully delineated the classifications of exempt employers and services. The organization of that section calls a few

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[1] cf. *International Bro. of Teamsters* v. *United States*, 431 U.S. 324, 354 n.39 (1977); *Fogarty* v. *United States*, 340 U.S. 8, 13-14 (1950). The intent of a statute will be determined without reference to a much later amending statute. *United States* v. *Re*, 336 F.2d 306, 315 (2d Cir. 1964), *cert. denied*, 379 U.S. 904 (1964); *United States* v. *Roth*, 333 F.2d 450, 454 (2d Cir. 1964), *cert. denied*. 380, U.S. 942 (1965).

well-known canons of construction immediately into play. First, there is the imperative that all parts of a statute be read together and harmonized so that the legislative will may be discerned in a coherent expression of policy; no sentence or member of a sentence may be read in isolation.[2] A somewhat ancillary principle was expressed thus by Mr. Justice Cardozo:

> "To fix the meaning of these provisions there is need to keep in view the background of their history. There is need to keep in view also the structure of the statute, and the relation, physical and logical, between its several parts.[3]

In the cited case it was held that where a subject is covered earlier in the statute, a later provision will generally not be viewed as covering the same subject. Subdivisions of the same section which are interrelated "must, therefore, be read together for coherence".[4]

Section 3309(b) established six classifications of exempt employers or services. The first [subd.(1)] dealt with churches and church organizations. The second [subd.(2)] dealt with certain of their ministers and religious orders.[5] The remainder of section 3309(b) deals with other categories, the descriptions of which do not

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[2] *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975); *Kokoszka* v. *Belford*, 417 U.S. 642, 650 (1974).

[3] *Duparquet Huot & Moneuse Co.* v. *Evans*, 297 U.S. 216, 218 (1936).

[4] *American Standard, Inc.* v. *Crane Co.*, 510 F.2d 1043, 1058 (2d Cir. 1974), *cert. denied*, 421 U.S. 1000 (1975).

[5] Subdivision (1) exempts only services of those "in the employ" of churches and church organizations. Subdivision (2) exempts services performed by ministers and members of religious orders who are not, strictly speaking, considered employees. The language in subdivision (2) is similar to that used in other employment tax provisions of the Code under which ministers and members of religious

deal with churches or religion either expressly or by necessary implication.

The "church" exemption in subdivision (b)(1) has two subparts which together embrace the entire subject of church organizations. Subpart (A) covers all services rendered in the employ of "a church or convention or association of churches." This language was not custom-made for FUTA. Rather, it carried into FUTA identical language which is found in other parts of the Code for different purposes. A germane analysis is contained in Whelan, *"Church" in Internal Revenue Code,* 45 Fordham L. Rev. 885, 887-891 (1977). The broad sweep of the language of subpart (A) is evident from the history and meaning of its antecedents.[6] Subpart (B) introduced a new formulation which includes organizations which would ordinarily be considered included in the broad subpart (A) language for purposes of some other Code provisions. The reason seems obvious. By

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orders have not been treated as employees. Ministers and members of religious orders are not subject as employees to withholding [§3401(a)(9)] and mandatory social security coverage [§§1402(e), 3121(b)(8)(A)].

[6] The language of subpart (A) appeared in the 1950 Code provisions exempting churches from the unrelated business tax imposed by section 421(b)(1)(A) on other organizations described in section 501(c)(3) of the Code. Section 421(b)(1)(A) was recodified at section 511(a)(2)(A) of the Code in 1954. During the recodification the Senate Finance Committee stated the following concerning the meaning of "church" in section 170 dealing with deduction of charitable contributions:

> "Your committee understands that 'church' to some denominations includes religious orders as well as other organizations which as integral parts of the church are engaged in carrying out the functions of the church whether as separate corporations or otherwise. It is believed that the term church should be all inclusive." S. Rep. No. 1622, 83rd Congress, 2d Sess. 30 (1954).

reason of a variety of corporate and other arrangements by which churches implement their missions, persons in the employ of certain church organizations might not in some cases be deemed "employees" of the "church or convention or association of churches."[7]

As already noted, the precise meaning of this statutory language, as applied to particular cases, is not the burden of this discussion. Rather, this *amicus* seeks only to demonstrate that when Congress dealt with exemptions for churches and church organizations, it did so entirely in section 3309(b)(1). This is clear from the structure of the statute and the relevant statutory language. There is no indication that Congress meant to omit from section 3309(b)(1) the entire subject of church schools, clearly a vital and integral part of the mission of churches,[8] in order to deal with it two subdivisions later. It has been quite correctly held concerning section 3309(b)(1)(A):

> "The statute plainly indicates that the exemption is contingent upon who the employer is and is not contingent upon the type of services the employee is performing."

States of Alabama and Nevada v. *Marshall*, 626 F.2d 366, 396 (5th Cir. 1980).

The foregoing demonstrates that the language of subdivision (b)(3) was not meant to operate in an unqualified way to *all* elementary and secondary schools. Church schools were not governed by subdivision (b)(3).

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[7] This is supported by the reference to separate incorporation in the legislative history. H.R.Rep. No. 612, 91st Cong., 1st Sess. 44 (1969).

[8] cf. *Meek* v. *Pittenger*, 421 U.S. 349, 366 (1975); *Lemon* v. *Kurtzman*, 403 U.S. 602, 616-619 (1971).

Indeed, neither were public elementary and secondary schools. In 1970 section 3306(c)(7) exempted all services rendered to the States and their political subdivisions and instrumentalities, although state coverage was extended to certain hospitals and institutions of higher education under section 3309(a)(1)(B).

The design and method of the statute is clear. In 1970 the general exemption theretofore granted to all section 501(c)(3) organizations by section 3306(c)(8) was withdrawn for state coverage purposes by section 3309(a)(1)(A), except for the special "church" exemption granted by section 3309(b)(1). Likewise, in 1970 the general exemption theretofore granted to states by section 3306(c)(7) was withdrawn on a limited basis for state coverage purposes by section 3309(a)(1)(B). In short, the statute dealt with church and public schools independently of section 3309(b)(3). Note should be made of the fact that in 1976 Congress extended state coverage to public elementary and secondary schools by amending section 3309(a)(1)(B) to include all section 3306(c)(7) services except for certain limited exceptions provided by a new section 3309(b)(3). Clearly, until 1976 the source of the exemption for public schools had been section 3306(c)(7) and not section 3309(b)(3).

It seems clear that before 1976 subdivision (b)(3) was intended to apply only to elementary and secondary schools operated by remaining section 501(c)(3) organizations which were not included in the subdivision (b)(1) exemption granted to churches and church organizations.

The 1976 amendments did not revoke the FUTA exemption of elementary and secondary church schools

It is obvious that the repeal of subdivision (b)(3) in 1976 could not revoke an exemption which churches were granted under subdivision (b)(1). The sparse remarks[9] contained in the House, Senate and Conference Reports can hardly operate to enlarge, by implication, the scope of subdivision (b)(3) beyond that intended at the time of its enactment.[10] As noted earlier, legislative intent is determined at the time of enactment.

If there were any lingering doubt of the foregoing by reason of remarks found in the legislative history, it would be foreclosed by the cardinal rule against repeals

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[9] H.R. Rep. No. 755 94th Cong., 1st Sess. 2, 6, 41, 56 (1975) S. Rep. No. 1265, 94th Cong., 2nd Sess. 2, 8-10 (1975), H.R. Conf. Rep. No. 1745, 94th Cong., 2d Sess. 11-12 (1976). These remarks do not in terms address the subject of church schools. They are consistent with the intended operation of subdivision (b)(3) in the sphere already indicated. To infer more is unwarranted. In this regard, note should be taken that the House Committee Report stated that the amendment ". . . had the effect of requiring the State to pay unemployment compensation on the basis of services performed for all educational institutions. Under existing law, the State is only required to provide coverage of services performed for institutions of higher education." One example of services exempt under section 3309(b)(1) which appears in the 1970 legislative history is "a college devoted primarily to preparing students for the ministry." H.R. Rep. No. 612, 91st Cong., 1st Sess. 44 (1969). Such a college is an "institution of higher education" as defined in FUTA section 3309(d). Plainly, the 1976 House Report was not dealing with church schools. If it was, it was guilty of basic error in its statements.

[10] *International Brotherhood of Teamsters* v. *United States*, n.1, *supra*, at 354 n. 39; *United States* v. *Price*, 361 U.S. 305, 312-13 (1960); *United States* v. *United Mine Workers of America*, 330 U.S. 258, 281-282 (1947).

by implication. Absent express and unequivocal words of repeal, an earlier statute is deemed repealed by a later one only if there is irreconcilable conflict and repugnance between provisions of each.[11] Regarding amending legislation, this Court has said:

> ". . . The intention of the legislature to repeal must be clear and manifest; otherwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act and will continue to speak, so far as the two acts are the same, from the time of the first enactment.[12]

If doubt persists concerning the foregoing two propositions, it should be resolved in favor of petitioners without constitutional excursions

An approach to statutory construction which requires a preliminary exploration of possible constitutional infirmities should be limited to cases of absolute necessity.[13] As this Court knows, its utterances concerning even the potentiality of constitutional mischief carry great weight despite their technical status as dicta and the fact that the Court does not reach the merits of the potential constitutional issue. By experience this *amicus*

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[11] *Tennessee Valley Authority* v. *Hill*, _____ U.S. _____, _____, 98 S.Ct. 2279, 2299 (1978); *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968); *Posadas* v. *National City Bank of New York*, 296 U.S. 497, 503 (1936).

[12] *Posadas* v. *National City Bank of New York*, n. 11, *supra*, at 503.

[13] See *NLRB* v. *Catholic Bishop*, 440 U.S. 480 (1979).

knows what effect they can have on federal employees (and others) who are charged with interpreting, implementing or influencing legislation. There are other salutary guides to construction which serve this Court well.

At the threshold there is the fact that FUTA is tax legislation. Its social objectives do not make it an exception; most tax legislation has the ultimate purpose of funding desired social ends. Beyond that, FUTA does more than tax. It also regulates. Surely it is appropriate to employ the rule of construction that resolves doubts under tax legislation against the government.[14]

More fundamental, however, is the rule which counsels a strict construction where a statute is said to take away a well-established right or privilege.[15] This Court has declared that courts must interpret statutes in a way which accords with established public policy unless the legislature "has given an affirmative indication of an intent" to the contrary.[16] This applies to "common law principles — many of them deriving from earlier legislative exertions."[17] The extraordinary strength and vitality of public policy rooted in our general law lies at the heart of the rule which counsels caution when statutes are said to undermine that policy.[18] Where a statute is both remedial and in deroga-

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[14] *Gould* v. *Gould*, 245 U.S. 151, 153 (1917). See also 3 C. Sands, Sutherland Statutory Construction, §6601 at 179 (4th ed. 1972).

[15] *Texas* v. *Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 436-437 (1906); *Globe* v. *Rutgers Fire Ins. Co.* v. *Draper*, 66 F.2d 985 (9th Cir. 1933)

[16] *Moragne* v. *States Marine Lines, Inc.* 398 U.S. 375, 393 (1970)

[17] Id. at 382; see 390-391.

[18] 2 A C. Sands, *supra*, §56.03 at 407.

tion of the common law, a rule of strict construction governs the extent of the derogation and a liberal rule guides its application.[19]

This court has stressed that the policy of exempting churches from various taxes in this country reflects a ". . . national attitude toward religious tolerance and two centuries of uninterrupted freedom from taxation. . . ." *Walz* v. *Tax Commissioner of City of New York*, 397 U.S. 664, 678, 676-678 (1970). "Few concepts are more deeply embedded in the fabric of our national life . . ." (at 676). "Such a policy is not something lightly to be cast aside" (at 677). So much more is this true where, as here, regulation inheres in the taxing measure.

The adoption of a rule of strict construction is especially appropriate today when the churches and ministers of this nation are increasingly the objects of taxation, and surveillance for tax and other purposes.[20] The phenomenon is alarming.[21] It should be a cardinal principle that governmental incursions in such areas must be unequivocally stated in statutes and regulations. Such a rule would promote clarity and reduce controversy save for the constitutional issues that may exist. To the extent such issues do exist, they should be presented as a matter of necessity when a statute or regulation clearly requires.

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[19] 4 C. Sands, *supra*, §60.01 at 29 nn. 2 & 4 (4th Supp. 1980).

[20] See *e.g.*, Whelan, *supra*. See also Note, *IRS Monitoring*, 45 Fordham L. Rev. 929 (1977).

[21] Next February representatives of approximately 40 denominations will gather in Washington, D.C. to participate in a conference on "Government Intervention In Religious Affairs."

CONCLUSION

For the reasons stated above, this *amicus* urges the Court to reverse the decision of the Supreme Court of South Dakota.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Motion for Leave to File Brief Amicus Curiae and Brief of United States Catholic Conference in Support of Petitioners have been served this 18th day of December, 1980 by mail on Edward Thomas Schilling, Esq., 757 North Broadway, Suite 500, Milwaukee, Wisconsin 53202, Counsel for Petitioners, and Judith A. Atkinson, Esq., Assistant Attorney General, Office of Attorney General, State Capitol, Pierre, South Dakota 57501, Counsel for Respondent.

GERALD C. TOBIN